Supreme Court, U.S.
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No. 93-____

In The
Supreme Court of the United States
October Term, 1993

JOE JUNIOR COWAN,
Petitioner,

vs.

THE STATE OF MONTANA
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

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QUESTIONS PRESENTED

Joe Cowan, an oft-diagnosed paranoid schizophrenic, committed a serious assault while in the throes of psychotic delusion. Because Montana has, by law, abolished the insanity defense, evidence clearly establishing his mental nonresponsibility for the assault, while admitted, was disregarded, and Mr. Cowan was sentenced to serve 60 years in prison for attempted murder.

Evidence respecting Mr. Cowan's mental illness, as well as his deranged behavior, was admitted at trial on the question whether he committed the assault "deliberately." However, by Montana statute, knowledge or purpose is presumed, in a case of attempted murder, from the acts, unless rebutted by evidence showing "justification or excuse."

These facts present the following questions:

1. Do either or both the due process, or the cruel and unusual punishment, clauses of the Constitution protect an insane person from suffering criminal conviction and punishment for acts over which he has no moral control?

2. Does a legal inference of purpose from conduct, combined with abolition of the insanity defense, create a burden-shifting or conclusive presumption of intent, in contravention of the doctrine enunciated by this Court in *Sandstrom v Montana?*

TABLE OF CONTENTS

Page

Opinions Below 1

Jurisdiction 1

Constitutional Provisions and Statutes Involved 2

Statement of the Case 3

Reasons for Granting the Writ 13

I. This case presents, in an ideal factual setting, an important question of federal law that has not been, but should be, settled by this Court: is the insanity defense, in some form, required by the US Constitution to be made available to a criminal defendant in a state court felony proceeding? 13

II. Although this Court has recently hinted that an insanity defense is not constitutionally required, the issue should be directly confronted; for abolishing the defense in fact jeopardizes some central values of our free society 18

III. The time is ripe for this Court to address the question whether there exist any constitutional strictures respecting the content of the substantive criminal law 22

IV. In this case, the Montana Supreme Court upheld a conviction based on a burden-shifting or conclusive presumption equivalent to that found constitutionally deficient in *Sandstrom v Montana* 26

Conclusion 29

TABLE OF AUTHORITIES

CASES Page

Ake v. Oklahoma, 470 U.S. 68 (1985) 18

Davis v. U.S., 160 U.S. 469 (1895)..... 22

Duncan v. Louisiana, 391 U.S. 145 (1968) 23

Foucha v. Louisiana, 112 S.Ct. 1780 (1992) .. 18,19,23

Harmelin v. Michigan, 111 S.Ct. 2680 (1991) 26

In re Winship, 397 U.S. 358 (1970) 24

Leland v. Oregon, 343 U.S. 790 (1952) 13,23

Martin v. Ohio, 480 U.S. 228 (1987) 23

Palko v. Connecticut, 302 U.S. 319 (1937)..... 20

Patterson v. New York, 432 U.S. 197 (1977) 25

People v. Skinner, 704 P.2d 752 (Cal. 1985) 14

Powell v. Alabama, 287 U.S. 45 (1932) 22

Powell v. Texas, 392 U.S. 514 (1968) 24-26

Rivera v. Delaware, 429 U.S. 877 (1976)..... 14

Robinson v. California, 370 U.S. 660 (1962) .. 18,19,26

Sandstrom v. Montana, 442 U.S. 510 (1979) 26

State v. Cowan, 861 P.2d 884 (Mont. 1993) 13,16

State v Searcy, 798 P.2d 914 (Idaho 1990) 14

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Constitution, Eighth Amendment 12,13,26

U.S. Constitution, Fourteenth Amendment ..... *passim*

Section 45-5-112 MCA 27

Section 46-14-102 MCA 28

Section 46-14-214 MCA 11

Section 46-14-311 MCA 3

Section 46-15-323(3) MCA 11

ALI-MPC Section 4.01 11

OTHER AUTHORITIES

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Robitscher and Haynes, In Defense of the Insanity Defense, 31 Emory L.J. 9 (1982) 14

TABLE OF AUTHORITIES (continued)

OTHER AUTHORITIES

Waelder, Psychiatry and the Problem of Criminal Responsibility, 101 U.Pa.L.Rev. 378 (1952) 15

Wales, An Analysis of the Proposal to Abolish the Insanity Defense, 124 U.Pa.L.Rev. 687 (1976) 14,17,20

In the
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JOE JUNIOR COWAN,
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vs.

THE STATE OF MONTANA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

The Petitioner, Joe Junior Cowan, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Montana Supreme Court entered in this proceeding October 6, 1993, and from which rehearing was denied on November 4, 1993.

OPINIONS BELOW

The opinion of the Montana Supreme Court is reported at 861 P.2d 884 (Mont. 1993). The denial of the petition for rehearing was not reported. The opinion and denial of the petition for rehearing are reproduced in Appendices A and D.

JURISDICTION

The judgment of the Montana Supreme Court was entered on October 6, 1993. A timely petition for rehearing was denied on November 4, 1993. This petition for certiorari is filed within ninety days of the denial of the petition for rehearing. The jurisdiction of this

Court is invoked under the provisions of 28 U.S.C. Section 1257 (a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Statutes and constitutional provisions involved are:

The Eighth Amendment to the United States Constitution, which provides in pertinent part:

...cruel and unusual punishments...shall not...be inflicted...

The Fourteenth Amendment to the United States Constitution, which provides in pertinent part:

No State shall...deprive any person of life, liberty, or property, without due process of law...

Section 45-5-112, Montana Code Annotated, which provides:

In a deliberate homicide prosecution, knowledge or purpose may be inferred from the fact that the accused committed a homicide, and no circumstances of mitigation, excuse, or justification appear.

Section 46-14-102, Montana Code Annotated, which provides in pertinent part:

Evidence that the defendant suffered from a mental disease...is admissible to prove that the defendant did or did not have a state of mind that is an element of the offense.

Section 46-14-311, Montana Code Annotated, which provides:

Whenever a defendant is convicted on a verdict or a plea of guilty and he claims that at the time of the commision of the offense of which he was convicted he was suffering from a mental disease or defect which rendered him unable to appreciate the criminality of his conduct, or conform his conduct to the requirements of the law, the sentencing court shall consider any relevant evidence presented at the trial and shall require such additional evidence as it considers necessary for the determination of the issue, including examination of the defendant and a report thereof as provided in 46-14-202 and 46-14-203.

STATEMENT OF THE CASE

Rule 14.1(g) Statement

Shortly before 7:00 p.m. on the evening of April 24, 1990, Maggie Doherty, a US Forest Service employee, returned to her residence quarters at the Lolo Work Center located in a remote section of Missoula County, Montana. Upon arriving home, she noticed that her television was on, and that her front door was unlocked, though she had left it locked when she went to work the previous day. Upon inspecting the interior of the house, she discovered that it appeared that someone had been lying on the couch in the living room, and that some of the food in the kitchen had been prepared and eaten. Also, there was a Forest Service pack and jacket on the floor, which she had not left there.

Somewhat alarmed, Ms. Doherty placed several calls to Forest Service personnel, during one of which she believed she heard someone listening in on one of the Work Center phone extensions. She informed whomever

was on the line that she was calling the police, and proceeded to do so.

As Ms. Doherty spoke with 911, she saw a man she had never seen before emerge from a nearby building. She was immediately struck by the unnatural and fearsome intensity of his facial expression, which she later described as "mad". At this point, she locked the doors and windows, and armed herself with her 12-gauge pump shotgun, which she loaded with the only ammunition at hand—blank shells.

The man went back and forth around the residence, trying the locked doors and looking in the windows. At several points, Ms. Doherty and he looked at one another directly through the window, and the man saw Ms. Doherty talking on the phone with 911, and holding her shotgun at the ready. At other moments, she yelled at him, inquiring what he wanted, and he either made no response or, at one point, responded "society bitch" and "mechanic robot bitch"—as he continued to circle around the house "like a wild animal." She also heard him "mumbling and yelling" things like, "it's my house," and "who are you?" and mimicking her in a bizarre fashion. Then Ms. Doherty looked out and saw him kicking at her car and trying to tear the license plate off it with his bare hands.

This phase of the encounter lasted for 15-20 minutes, during all of which time Ms. Doherty remained — as the intruder knew — on the phone with the police,[1] and armed with an apparently deadly weapon.

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[1] The delay in the emergency response to Ms. Doherty's call was attributable to the fact the nearest patrol car at dispatch was 18 miles from the Work Center — something defendant could not have surmised, since the previous evening he had been questioned by a deputy in the vicinity of the Work Center.

The man disappeared, and shortly returned carrying a hodag (an adze-like tree-planting tool). Ms. Doherty saw him as he came back in the direction of the residence and noted on his face an "angry, serious" look which terrified her in its fixity and intensity.

The man struck at the lock on the door with the hodag, eventually shattering it. He then came toward Ms. Doherty across the entire length of the house, with the hodag raised in an unnatural, "almost mechanical" but terrifying manner, "up in the air like a baseball bat." He never hesitated, although she had the shotgun leveled at him the entire time, and pulled the trigger as he approached within a few feet of her.

The shotgun misfired, and the man—without saying anything further—assaulted Ms. Doherty with the hodag. Although she tried to fend him off, for a while using the shotgun to parry the blows, he struck her repeatedly with the implement about the head, arms, and shoulders, until she eventually fell, semi-conscious and helpless, to the floor by the door.

The responding officers found Ms. Doherty lying badly injured by the door. They found the Petitioner, Mr. Cowan, standing near the mess hall. When confronted by the officers at gunpoint, Mr. Cowan ran around to the back of the mess hall, saying "something about getting a backpack." When the officers gave chase "expecting to see him running for the trees," they found him standing next to the building with the backpack, where he quietly surrendered.[2] The hodag was later found lying in the

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[2] Why Mr. Cowan risked being shot in order to retrieve his "new" backpack — a fairly flimsy and inexpensive item of Forest Service gear — can only be understood in light of the testimony of the Missoula County Sheriff's deputy who had questioned Mr. Cowan the previous evening. According to that deputy, Mr. Cowan had attracted his attention as he walked in the rain near the Lolo Work Center — carrying his belongings in a plastic garbage bag.

grass in plain view between the residence and the mess hall.

Describing her impressions of Mr. Cowan's conduct months later at trial, Ms. Doherty was asked:

> Q: What did you make of that behavior?
> A: I don't know, I didn't know at the time.
> Q: Did it make any sense to you at the time?
> A: Nothing did that whole night ...no.

Between his arrest and trial, Mr. Cowan underwent mental health evaluations by five different professionals, including a psychiatrist and a clinical psychologist retained by the State, a psychiatrist and a clinical psychologist retained by the Defense, and a staff psychiatrist at Warm Springs State Hospital appointed by the Court. Each of these professionals found Mr. Cowan to be seriously mentally ill, suffering from a psychiatric disorder each identified as Schizophrenia, paranoid type.[3] This diagnosis was consistent with that rendered over the years by numerous mental health institutions located in Mr. Cowan's home state of North Carolina.

Each of the psychiatric professionals found, more specifically, that Mr. Cowan suffered from:

(1) an inability to understand and deal with reality;

(2) paranoia, that is, irrational feelings of persecution and terror;

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[3] The severity of the disorder was such that on September 7, 1990, the Defendant was found to be mentally incompetent to stand trial, and was committed to the State psychiatric facility. Ninety days later, after undergoing an intensive course of psychotropic medication, Mr. Cowan was determined to be competent to stand trial (see Appendix I).

For a comprehensive clinical description of schizophrenia, see Appendix K.

(3) hallucinations;

(4) ideas of reference;

(5) a delusional belief system;

(6) disorganized and incoherent thought and speech;

(7) vulnerability to impulsive loss of control and disintegration of emotional controls.

One of the relevant features of Mr. Cowan's delusional belief system, not uncommon in cases of schizophrenia, was found to be a conviction that many of the human beings in his environment were in fact robots, acting with evil purpose.

At trial, three of the mental health professionals who were called as witnesses attempted to describe the effect of the complex thought disorder underlying schizophrenia on the emotions, actions, and conduct of the mentally-ill person. According to Defense psychiatrist Noell Hoell, M.D.:

> "It is an altered or abnormal state of mind in which an individual's ability to understand and deal with reality is significantly impaired, either because of hallucinations, delusions, misinterpreting events, inability to reason — a mood state that leads one to false conclusions in such a way, one's ability to deal with the environment in a reasonable way is impaired."

According to Defense psychologist Robert Shea:

> "A person is suffering from a form of disorder where thinking and reality testing is extremely distorted. A person has a very difficult time distinguishing between what is real and what is fanciful."

According to prosecution psychologist Herman Walters:

> "In general the presence of a delusion provides false assumptions, false premises, on which the individual then acts. The acts are likely to be consistent with the delusions, but to outward appearances bizarre or unacceptable or strange, because we don't know the premises and we don't make the connection that they do..."

Drs. Hoell and Shea testified that in their opinion, Mr. Cowan was in the throes of an intense "psychotic delusional process" when he attacked Ms. Doherty on April 24, 1990. Each testified that this had been established "to a reasonable scientific certainty." In a report filed with the Court, experienced prosecution forensic psychiatrist William Stratford, M.D., opined that "it is much more likely than not that Mr. Cowan was functioning in his delusional system at the time of the criminal conduct..." [Appendix H]. The prosecution psychologist, Dr. Walters, testified that the Defendant "may have been" in a delusional or psychotic state at the time of the incident. He explained:

> "The presence of his disorder, his history of it, plus that kind of behavior certainly raised the possibility of psychosis at that time, but I don't have a way of establishing with any conviction whether he was or not..."

He had no way, he then explained, because, in his opinion, no mental health professional could ever reconstruct an individual's past state of mind with any degree of accuracy.

Each of the three psychiatric professionals who

appeared at trial testified that there existed virtually no possibility that Mr. Cowan was "malingering" or "faking" his mental illness. The prosecution clinical psychologist was particularly unequivocal on this point [see Appendix J].

Each of the psychiatric professionals who appeared at trial testified that if an individual suffering from paranoid schizophrenia was in a condition of severe psychotic disruption at the time of an assault, such a person's ability to appreciate the criminality of conduct or conform it to law would be substantially impaired. Two of these witnesses were sure the defendant was in such a condition on April 24, 1990; the third was uncertain. In addition, prosecution psychiatrist Stratford also found that Mr. Cowan's ability to appreciate the criminality of his conduct at the time of the assault was "certainly limited but not absent as a result of his mental disease."

There was no evidence offered at trial which tended to contradict the thesis — established by both eye witness and expert medical testimony — that the acts of the defendant during the assault were those of a madman.[4] Nevertheless, all the professionals who participated in evaluating Mr. Cowan were clear that he, like

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[4] The State did, as is customary in such cases, put on testimony tending to show that, at times, Petitioner Cowan could present himself fairly normally. This, of course, in no way contradicted the hypothesis that the assault was a product of psychosis. As explained in the report issued by the State Mental Hospital:

> "When the symptoms of this disorder are not well controlled with appropriate treatment he experiences significant disruption in reality contact. Records document his having experienced auditory hallucinations, visual hallucinations, ideas of reference, and extensive paranoid delusions. It is interesting to note that the severity of these symptoms varies quite a bit

all schizophrenics, possessed at least the *capacity* to act "purposely and knowingly" in some rudimentary sense of the words. As prosecution psychiatrist Stratford put it: "it is my professional opinion that a person can act knowingly and purposely, and still be functioning in a psychotic or delusional world." As to whether Mr. Cowan did act, in some sense, with purpose or knowledge during the actual assault, there was disagreement among the professional witnesses, largely based on their different understandings of what it might mean to characterize acts stemming from palpable mental derangement as "deliberate" acts.

Rule 14.1(h) Statement

As a result of the assault on Maggie Doherty, Petitioner Cowan was charged with the offenses of attempted deliberate homicide and aggravated burglary.[5] Having waived a jury, Mr. Cowan was tried before

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> over time. Records indicate that Mr. Cowan can appear perfectly normal at times, while at other times he appears to be in an obviously psychotic state. Such variation in the intensity of psychotic symptoms is not unusual in an individual diagnosed as suffering from Paranoid Schizophrenia. It also appears likely that Mr. Cowan is a reasonably intelligent individual who is somewhat reluctant to reveal the symptoms of his mental illness. Thus, when his symptoms are under reasonably good control he appears able to "cover" his illness by not revealing his delusional thoughts. It is quite likely, however, that his underlying delusional beliefs persist even when the more overt signs of his mental illness are not readily apparent." [Appendix I]

[5] The burglary count, based on unpermitted entry into an occupied structure, was essentially duplicitous. Since the sentence based on petitioner's conviction on this count runs concurrently with his primary sentence, and the defense — insanity — would be the same, the burglary count is treated herein as presenting identical issues with the charge of attempted murder.

the Court on December 17-20, 1990. Pursuant to a defense Notice of Intent[6] filed before trial, the only issue at trial was whether Defendant should be acquitted by reason of insanity. Because insanity as an independent defense was abolished by the Montana legislature in 1979, the only statutory grounds for an insanity acquittal would be if defendant were shown to lack the capacity to act deliberately, that is, knowingly and purposely.[7] Nevertheless, a copious quantity of eyewitness and psychiatric evidence that would have been relevant to establishing a traditional insanity defense was admitted at trial, with virtually no evidence being excluded on grounds of relevancy. At the close of the evidence, the Defense presented the Court with a lengthy Memorandum of Law challenging, in various respects, the constitutionality of the Montana statutory scheme governing the handling of mental illness in a criminal context. In particular, the defendant argued that the due process and/or cruel-and-unusual-punishment clause of the US Constitution guaranteed him the right to an acquittal based on the affirmative defense of mental disease or defect excluding responsibility, articulated in some traditionally-recognized form, such as the M'Naghten test or the ALI Model Penal Code formulation.[8] [See Defense Memo, Appendix E].

On December 20, 1990, in a bench ruling an-

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[6] Although Montana has abolished the insanity defense, the defendant is still required by statute to give pre-trial notice of intent to rely upon mental disease to disprove criminal state of mind. Section 46-15-323(3), MCA.

[7] Section 46-14-214 MCA provides that "when the defendant is found not guilty... for the reason that due to a mental disease... the defendant did not have a particular state of mind... that is an element of the offense, the verdict must [so] state."

[8] ALI-MPC Section 4.01 provides:

"A person is not responsible for criminal conduct if at the time of the conduct, as a result of mental disease or defect, he lacks substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law."

nounced immediately after reviewing the Defense Memorandum of Law, the Court found Petitioner Cowan guilty.

On January 28, 1991, the Defense filed a Motion to Set Aside the Verdict, together with a Brief. In this document, the issue was raised of whether a conclusive or burden-shifting presumption was operating to preclude *any* insanity-based acquittal under the Montana statutory scheme. [See Motion, Appendix F].

On February 12, 1991, the Court promulgated Findings of Fact and Conclusions of Law drafted by the prosecutor. [Appendix B].

On February 13, 1991, the Defendant was sentenced to serve 60 years in the Montana State Prison. [Judgment, Appendix C].

On appeal to the Montana Supreme Court, the Defendant argued, among other things, that his conviction violated: (1) his federal constitutional right to assert an independent, affirmative defense of insanity; and (2) his *Sandstrom* due process right not to have criminal intent presumed from his acts. Without relying on the trial court's fact-finding, the Montana Supreme Court, in a 5-2 decision, specifically held: (1) that neither the Eighth nor Fourteenth Amendments of the US Constitution conferred any right on a criminal defendant to assert an affirmative defense of insanity; (2) that the challenged presumption permitted, but did not require, intent to be presumed from acts. A lengthy dissent took the position that Montana's abolition of the insanity defense did violate the due process clause.

REASONS FOR GRANTING THE WRIT

I. This case presents, in an ideal factual setting, an important question of federal law that has not been, but should be, settled by this Court: is the insanity defense, in some form, required by the US Constitution to be made available to a criminal defendant in a state court felony proceeding?

"Joe Cowan is certifiably insane, and it was uncontroverted that at the time of the acts with which he was charged he did not understand that his conduct was wrong." *State v Cowan*, 861 P.2d 884, 894 (Mont. 1993) (Justice Trieweiler, dissenting). Yet, because the defense of insanity has been abolished in Montana, Joe Cowan was convicted and sentenced to be incarcerated in the Montana State Prison for 60 years. At the trial level and on appeal, Mr. Cowan continuously and expressly asserted a right grounded in the US Constitution not to suffer the stigma of conviction and the cruelty of punishment for acts which he could, and did, demonstrate were committed without normal awareness and moral culpability on his part. The Montana Supreme Court, directly confronting the issue raised by these circumstances, determined that neither the Fifth nor the Eighth Amendments of the US Constitution (as applied to the States by the Fourteenth) required that the defense of insanity be available to a State criminal defendant. In so deciding, the Montana Court relied on the absence of any direct authoritative precedent on this question from the US Supreme Court.

This case presents an ideal vehicle for settling a question which has remained vivid but unanswered for four decades, ever since *Leland v Oregon*, 343 U.S. 790 (1952). In that case, this Court held that the formulation of the relevant test of criminal insanity, as well as the

allocation of the burden of proof on insanity, were matters within the province of the state legislatures. Some have taken this to mean that states are free also to deny the defense altogether to persons charged with serious crimes.[9] Others read *Leland*, on the contrary, as standing for "the proposition that the insanity defense, in some formulation, *is* required by due process," *People v Skinner*, 704 P.2d 752, 758 (Cal. 1985). See also, *State v Searcy*, 798 P.2d 914, 922-926 (Idaho, 1990) (Justice McDevitt, dissenting).

The matter has come to a head in recent years because three States—Montana, Idaho, and Utah — have by legislative action eliminated mental nonresponsibility as an independent, exculpatory doctrine in their criminal law. This, combined with Congress' highly publicized consideration of similar legislation, has occasioned much discussion of the place of the insanity defense in the American system of criminal justice. Commentators have not been shy in suggesting that the question of its constitutional status is a crucial one, begging resolution by this Court, nor that the resolution should or would be in the direction of finding the insanity defense "fundamental" to the Anglo-American criminal process. See, generally, ABA Criminal Justice Mental Health Standards, Commentary to Section 7-6.1 [reprinted as Appendix L]; Robitscher and Haynes, "In Defense of the Insanity Defense," 31 Emory L.J. 9, 51-59 (1982); "The Proposed Federal Insanity Defense," 22 Amer. Crim. L. Rev. 49, 57-63 (1984); Wales, "An Analysis of the Proposal to Abolish the Insanity Defense," 124 U.Pa. L. Rev. 687, 702-704 (1976).

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[9] A view to some extent supported by this Court's decision in *Rivera v Delaware*, 429 U.S. 877 (1976), which seemed to imply that sanity was not a fundamental component of criminal responsibility.

If the matter of the constitutional status of the insanity defense is to be decided, it should be in a case where the defendant is clearly insane. Best would be a case where the condition of insanity which produced the criminal acts

> "is well-defined and beyond controversial interpretation; i.e. a condition in which the sense of reality is crudely impaired—for example, when people are confused or disoriented or suffer from hallucinations or delusions ... as ... in schizophrenia..."
>
> —Waelder, "Psychiatry and the Problem of Criminal Responsibility," 101 U.Pa.L. Rev., 378, 384 (1952).

As pointed out by Abraham Goldstein in his definitive treatise The Insanity Defense, schizophrenia is the "core" mental disease leading to or requiring the insanity defense, for it produces the archetypal set of symptoms raising doubt as to the moral significance of the defendant's harmful acts: "breakdown of intellect, serious loss of self-control, loss of a sense of reality ... symptoms which may appear in the form of delusions, hallucinations, disorientation, assaultive behavior, or extreme withdrawal".[10]

Joe Cowan's case fits precisely within the pure psychiatric model. As summarized by Montana Supreme Court Justice Trieweiler:

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[10] Goldstein, The Insanity Defense (Yale, 1967), 25. Interestingly, Goldstein believes a violent, apparently motiveless, random assault committed by a paranoid schizophrenic and by him justified vaguely, but wholly irrationally, as self-defense, represents the quintessential situation in which a finding that the criminal acts were *directly* caused by the mental disease is most reliable, *op. cit.*, 33. This sort of irrational self-defense justification was advanced privately by Petitioner Cowan: see Appendices G, H, and I herein.

"The behavior of defendant ... was nothing less than bizarre and irrational ... throughout ... Everyone who examined defendant concluded he was suffering from paranoid schizophrenia ... defendant was in a psychotic state at the time he attacked the victim ... In that state, he could not understand or deal with reality because of delusions and misinterpretation of events ... he could make a decision about what he was doing within his own sense of reality ... but at the same time, would not be able to understand the real implications of his conduct because of the delusions under which he acted... There was no testimony from any witness to controvert the expert medical opinion that, because of serious mental disease, the defendant was unable to appreciate the criminality of his conduct at the time he assaulted the victim ... The result in this case is the worst case scenario anticipated by national critics of Montana's insanity law..." [11]

—*State v Cowan, supra,* 861 P.2d at 890-92 (Trieweiler, dissenting)

If the matter of the constitutional status of the insanity defense is to be decided, it should be decided, also, in a case where the ultimate holding can be as limited as possible. This is because a decision that the defense is required by the Constitution, for example, results inevitably in mandating some national uniformity in the criminal law. Nearly everyone agrees that this

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[11] One of those critics was prosecution psychiatrist William Stratford, who, in his psychiatric report to the court on Joe Cowan, characterized Montana's abolition of the insanity defense as "infamous" (Appendix H).

result is in itself undesirable, and that the interests of federalism, the public welfare, and the rights of individual citizens are probably best advanced in the long run by encouraging a maximum degree of innovation and experimentation in the criminal justice systems of the various states. The exception to this rule may perhaps be found in innovation and experimentation which has the effect of eliminating one or more of the most basic structural features of the Anglo-American regime of criminal jurisprudence. These features, which are both time-honored and time-tested, may indeed be thought to be indispensable in order that a criminal justice system patterned as ours is, function in a manner that remains "fundamentally fair."[12] Such a conclusion, sparingly applied, still leaves the states ample room for social experiment within a stable skeleton of concepts inherited from the common law.

Joe Cowan's case comes to this Court in an ideal posture in this regard also. The issue it raises is as basic and narrow as possible: can the insanity defense be eliminated *altogether* by the states? Can our traditional concept of criminal culpability, with its attendant liability for radical personal stigma and maximum loss of liberty, dispense altogether with the core sanity of the actor as a premise? Because both Cowan's disease and his resulting conduct were so extreme, a holding that he should have had the chance to avoid criminal liability on account of mental nonresponsibility, would still leave the states great flexibility in the methods and standards used in making that determination, as well as wide latitude in dealing with the degrees and consequences of mental illness in a criminal justice context. At the same time, it would discourage that form of innovation which responds to the ever-present temptation to "solve" social

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[12] See, Wales, *supra*, 124 U.Pa.L.Rev. at 689; 691; 702-704

problems by an unfortunate lapse into barbarism.[13]

II. Although this Court has recently hinted that an insanity defense is not constitutionally required, the issue should be directly confronted; for abolishing the defense in fact jeopardizes some central values of our free society.

In a number of dicta in recent years, members of this Court have suggested that the availability of the insanity defense is not guaranteed by the United States Constitution. As early as 1985, the now Chief Justice stated "It is highly doubtful that due process requires a state to make available an insanity defense to a criminal defendant," *Ake v Oklahoma*, 470 U.S. 68, 91 (1985) (Rehnquist, dissenting). In 1992, Justice O'Conner, in a concurrence specifically written to emphasize the point, explains that a case holding "does not indicate that states must make the insanity defense available," *Foucha v Louisiana*, 112 S.Ct. 1780, 1790 (1992) (O'Conner concurring). In the same case, Justice Kennedy notes that "It is well accepted that the states may define their own crimes and defenses," *Foucha supra*, 112 S.Ct. at 1795 (Kennedy, dissenting)—and then approvingly cites Montana's abolition of the insanity defense as an example of the proper exercise of State autonomy in this regard.

If these individual opinions state the law of the land,[14] it is incumbent on this Court to say so—specifically, unequivocally and in the context of a proper case. This is because the insanity defense (not to mention all

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[13] *Robinson v California*, 370 U.S. 660, 676 (1962) (Justice Douglas, concurring in judgment): development of the insanity defense represents "the revulsion of civilized man against barbarous acts."

[14] They may not; ironically, all of these dicta were offered in cases where the actual holdings tended to underline the jurisprudential importance of the insanity defense.

other "crimes and defenses"[15]) supports and is inseparably linked to some pretty ancient and fundamental values of our free society.

The first and most obvious of these values is that of enlightened social conduct, which is usually thought to include the humane treatment of the unfortunate, the mysteriously accursed.[16] As a preeminent student of the insanity defense pointed out, when the defense is asserted, it calls upon a jury—"speaking as surrogate for the community and the victim—to decide whether the person accused of crime is to be condemned as a criminal or regarded compassionately as insane."[17] The social basis of the defense is the notion of *blame*—the notion that "only the evil man, the one who intended to cause the injury, deserves to be punished"[18]—in contrast to one who is mentally ill, and who, as a consequence, cannot help what he does, and is pitiful. The defense is said to have developed very early under the aegis of the King's Peace, which, by institutionally invoking the sanctions of death or imprisonment for antisocial conduct, "was designed to channel the anger of victims and their friends lest they seek personal revenge" for crime.

> "A corollary of this, however, was the feeling that so serious a sanction ought not to be imposed in situations in which the initial impulse to anger was likely to give way, even among victims, to feelings of compassion. These were situations in which the offender seemed so obviously different from most men that he could not be blamed for what he had done"[19]

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[15] *Foucha, supra*, 112 S.Ct. at 1789-90; 1794-95; 1809.
[16] *Robinson v California*, 370 U.S. 660, 666-67; 676 (1962)
[17] Goldstein, The Insanity Defense, *supra*, 3, 12
[18] *Id.*, 10.
[19] *Id.*, 12.

The passage of time has in no way, presumably, tended to diminish the general conviction inherited from the rudimentary stages of the development of civilized sensibility, that the blameless ought not to be punished. What it has done, however, is to make clearer that the adherence to this principle may possess some unlooked-for social utility, beyond that which is intrinsic to all collective exercises of compassion. This utility is chiefly located in the tendency of the insanity defense continually to reinforce the validity of the core concept of the moral responsibility of the individual, thus enhancing both the order, and the liberty, which go to compose "a scheme of ordered liberty."[20]

The concept of moral responsibility enhances liberty because it constitutes a substantial restraint on state control over the individual. It articulates a clear, tradition-proven limit on the coercive power of the State, and marks a boundary of individual accountability to the collective will. It *ensures* that a free man can remain free, by exercising free will. It thus, among other things, prohibits the State, through its embodiment in the insanity defense, from utilizing the criminal law for other purposes than to punish the morally autonomous—i.e., the wicked. As a leading scholar of the defense warns, concerning its abolition:

> If we are to extend state power over individuals to the substantially blameless in an attempt to eradicate their dangerous propensities, we should do so directly and openly under the rubric of a new jurisprudence of preventive confinement rather than indirectly by warping traditional concepts of criminal accountability. The direct approach would focus our attention on the real values at

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[20] *Palko v Connecticut*, 302 U.S. 319, 325 (1937)

issue.[21]

The concept of moral responsibility enhances order because of the obvious truth that an individual's perception of personal responsibility or free will affects his behavior in important ways. Unless it can be shown that the insanity defense and related responsibility defenses do not reinforce the average citizen's belief in his own personal responsibility, then their abolition may well—ironically—*subvert* "law and order." It is perhaps more than merely interesting that each of the modern scholars who have thought seriously about the insanity defense have reached precisely that conclusion.[22]

The concept of personal responsibility, and hence moral culpability, then, may truly be one of those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,"

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[21] *Wales, supra,* 124 U.Pa.L.Rev. at 700-01.

[22] See, e.g., Fletcher, Rethinking Criminal Law (1984), 846:

"[the insanity defense] expresses respect for the autonomy of the sane as much as it shows compassion for the insane. The line between the two may shift over time. Our theories of sanity may change. But the line remains. If the criminal law is to be an institution expressing respect as well as compassion, its institutions must be able both to punish the guilty and excuse the weak. These two sentiments depend on each other. Compassion is possible only so far as punishment is the norm. Punishing wrongdoing is possible only so far as we have a concept of accountability for wrongdoing."

Goldstein, The Insanity Defense, *supra,* 224:

"The insanity defense plays a part in reinforcing the sense of obligation or responsibility. Its emphasis on whether an offender is sick or bad helps to keep alive the almost forgotten drama of individual responsibility. Its weight is felt through the tremendous appeal it holds for the popular imagination, as that imagination is gripped by a dramatic trial and as the public at large identifies with the man in the dock. In this way, it becomes part of a complex of cultural forces that keep alive the moral lessons, and the myths, which are essential to the continued order of society."

See also Wales, *supra,* 124 U.Pa.L.Rev. at 710.

Powell v Alabama, 287 U.S. 45, 67 (1932). If, as this Court stated long ago, "a crime...necessarily involves the possession by the accused of such mental capacity as will render him responsible for his acts," *Davis v United States*, 160 U.S. 469, 485 (1895), it may be that the concept of moral culpability logically implies a system of criminal law wherein the possibility is maintained of establishing nonculpability by showing substantial impairment of a person's capacity for free choice, whether this arises from internal mental disorder, or circumstantial constraint. If so, one would have to agree with the American Bar Association's view that the abolition of the insanity defense is "indefensible... the [social] basis of the mental non-responsibility defense is undeniable, and has been reaffirmed throughout the history of western civilization."[23]

III. The time is ripe for this Court to address the question whether there exist any constitutional strictures respecting the content of the substantive criminal law.

The decision on the question presently presented has, naturally, implications that go far beyond the treatment of insanity in the criminal law. In fact, its implications go to the heart of the criminal law itself. For

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[23] ABA, Criminal Justice Mental Health Standards, Commentary to Section 7.61 [Appendix L]. As pointed out by the ABA Commentary, the insanity defense had become firmly established at the time of the adoption of the American Constitution, and has remained a fundamental part of our criminal law ever since. The only deliberate efforts to eliminate the defense (before the one at issue here) were made early in this century, by the legislatures of Mississippi, Louisiana, and Washington and were all invalidated by state courts on due process or eighth amendment grounds. Otherwise, there is almost no existing precedent on abolition, because, until the Montana legislature abolished the defense in 1979, no legislature had "asked those who administer and apply the law to condemn as criminal the acts of mentally ill defendants who are grossly out of touch with reality."

if the abolition of such a traditional—and important—feature of the "Anglo-American regime"[24] of criminal jurisprudence as the insanity defense is permitted, then it is difficult to see what substantive part or feature of our common law of crimes may not be radically altered or eliminated at the discretion of the legislature. For example: if the affirmative defense of insanity is not required by "generally accepted concepts of basic standards of justice"[25] then surely the affirmative defense of self-defense stands on no sounder footing. Does the constitution permit conviction and long-term incarceration of an individual who, though killing, can demonstrate that he killed to save his own life from unprovoked assault—if only the legislature, for whatever reasons, repeals that most ancient principle of justification?[26] Or, going further: may homicide, for example, be made a strict liability offense, with no showing whatsoever of an actor's awareness of conduct, circumstances, or consequences being required? Does the constitution permit life imprisonment of an individual who, though causing another's death, can show conclusively it was an accident, by no remotest stretch of the imagination his fault? If "the definition of both crimes and defenses is a matter of state law,"[27] unqualified by any possible constitutional strictures, then the answer, again, is: yes.

Though such conclusions may seem shocking to the uninitiated, they could harmonize with the developing intention of this Court's criminal jurisprudence. As

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[24] *Duncan v Louisiana*, 391 U.S. 145, 149-50 fn 14 (1968)

[25] *Leland v Oregon*, *supra*, 343 U.S. at 799.

[26] If there is any equivalency between the defenses, then—assuming the abolition of the insanity defense is allowed—the answer is clearly: yes. That there is an equivalency seems to have been made apparent in *Martin v Ohio*, 480 U.S. 228 (1987), a self-defense case uncannily parallel with *Leland v Oregon* in its doctrine of affirmative defenses.

[27] *Foucha v Louisiana*, *supra*, 112 S.Ct. at 1794 (Kennedy, dissenting).

many commentators, as well as the Court itself have recognized, in over 200 years the "Court has never articulated a general constitutional doctrine of *mens rea*," *Powell v Texas*, 392 U.S. 514, 535 (1968),[28] nor in fact gone any "but a very small way into the substantive criminal law," *id.* at 533.[29] It is entirely possible that this Court really views the Constitution as imposing *no* restraints on any sovereignty, federal or state, in regard to defining the penal law as it sees fit.[30]

On the other hand, in *In re Winship*, 397 U.S. 358, 364 (1970), this Court firmly held, as a matter of *substantive due process*, that criminal liability could only be imposed on an individual after "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[31] This holding was

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[28] "Constitutional acceptance of a requirement of culpability is at best uncertain... In terms of judicial exposition the existence of any constitutional constraints on the substantive criminal law is largely *terra incognita*," Jeffries and Stephan, Defenses, Presumptions and Burden of Proof in the Criminal Law, 88 Yale L.J. 1325, 1366, 1374 (1979).

[29] In *Powell*, the Court interpreted *Robinson v California*, *supra*, as having established that "criminal penalties may be inflicted only if the accused has committed some act which society has an interest in preventing, or perhaps in historical common law terms, has committed some *actus reus*," *Powell*, *supra*, 392 U.S. at 533. This decision thus seems to have constitutionalized the traditional requirement of an overt act as a prerequisite for the imposition of criminal liability. See, Jeffries and Stephan, *supra*, 88 Yale L.J. at 1371.

[30] If this is so, one may ask with Professor Hart: "What sense does it make to insist upon procedural safeguards in criminal prosecutions if anything whatsoever can be made a crime in the first place?" Hart, *The Aims of the Criminal Law* 23 Law and Contemp. Prob. 401, 431 (1958).

[31] Though a decision regarding a standard of proof could be viewed as procedural in the broadest sense, *Winship* was the first and only case in which this Court has gone beyond selective incorporation of the Bill of Rights, and determined that the due process clause itself created a specific guarantee enforceable against the states.

justified as one safeguarding an "historically-grounded right," as recognizing one of "the fundamental principles that are deemed essential for the protection of life and liberty," *Winship, supra*, 397 U.S. at 362; as "a prime instrument for reducing the risk of convictions based on factual error." *Id*, at 363. Yet, it might be thought that a constitutional standard designed to bias factfinding in favor of the innocent can be effective only if it embodies a constitutional conception of what innocence is. The Court seemed to have this in mind when, some six years after *Winship*, in discussing the States' sweeping prerogatives with respect to defining both crimes and defenses, it said: "But there are obviously constitutional limits beyond which the states may not go in this regard," *Patterson v New York*, 432 U.S. 197, 210 (1977). Since many, if not most, of the relevant problems concerning the definition of crimes and defenses cluster around assessing the "moral accountability of an individual for his antisocial deeds," *Powell, supra*, 392 U.S. at 535-36, *Patterson's* dictum would seem to imply recognition of the need, if not the duty, to determine what the Court said in *Powell* it would be "troubling" to have to determine: "the scope and content of...a constitutional doctrine of criminal responsibility," 392 U.S. at 534. Some day this dilemma will have to be resolved.

Joe Cowan's case could be the appropriate vehicle for resolving it, for the legal unavailability of the insanity defense in a case where the defendant is clearly insane results in the imposition of the gravest personal liabilities on an individual absent proof of meaningful personal fault. In that sense, it crosses the one essential line that should be drawn in the substantive criminal law: the line between moral blameworthiness and unchosen harm. It appears inconsistent with the traditional Anglo-American concept of fairness to the individual to permit any of the coequal sovereigns in our federal system to "cast aside the centuries-long evolution of interlocking... concepts which the common law

[has] utilized to assess the moral accountability of an individual..." *Powell, supra*, 392 U.S. at 535.

When, in *Robinson v California*, this Court did establish that the requirement of an objective act *was* a constitutionally mandated prerequisite for the imposition of criminal liability, it bottomed its holding on the Eighth Amendment, not the due process clause, see *Powell, supra*, 392 U.S. at 533. Since cruel and unusual punishments comprise not only those that are bizarre, but those that are wholly unwarranted, see *Robinson, supra*, 370 U.S. at 667, the Eighth Amendment may be the fitting source for the minimum jurisprudence of the substantive criminal law suggested here. This is so especially in a case involving criminal insanity, for condemning and imprisoning, or executing, the insane as criminals is, in our tradition, "unusual" punishment in the strictest technical sense—it has not been practiced in Anglo-American societies for centuries, nor specifically in the United States since the adoption of the Constitution.[32]

IV. In this case, the Montana Supreme Court upheld a conviction based on a burden-shifting or conclusive presumption equivalent to that found constitutionally deficient in *Sandstrom v Montana*.

Although this Court held, in *Sandstrom v Montana*, 442 U.S. 510 (1979), that a jury instruction embodying the statutory presumption that a person intends the ordinary consequences of his voluntary acts unconstitutionally relieved the prosecution of the burden of proving the intent element of the crime, a similar statutory presumption still applies to all homicide cases in Montana: "knowledge or purpose may be inferred

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[32] See *Harmelin v Michigan*, 111 S.Ct. 2680 (1991), for a most comprehensive analysis of both the historical and proportionality components of the Eighth Amendment.

from the fact that the accused committed a homicide, and no circumstances of mitigation, excuse, or justification appear."[33] In his state appeal, Petitioner Cowan contended that, in view of the extremely strong evidence presented of disorganized, irrational, and manic behavior during the assault, as well as the uncontroverted evidence of serious mental illness, the trial court must have utilized this presumption to find him guilty beyond a reasonable doubt. The Montana Supreme Court apparently agreed,[34] but decided on the merits that the presumption at issue was "permissive," and thus its use did not conflict with *Sandstrom*.

Although it seems clear that this conclusion involves misunderstanding of *Sandstrom* generally,[35] what is more important is the way the presumption was interpreted and used in this particular case of an insane defendant. As the Montana Supreme Court interprets the presumption, "any evidence of organized or integrated conduct may suffice to establish criminal intent," *Cowan*, 861 P.2d at 888. But since the laws of nature demand *some* level of organized or integrated conduct in order to bring about any result in the world, including a harmful one, it follows that intent is automatically established by conduct: if the conduct was organized or integrated enough to permit the doing of harm in the first place, it was—under this interpretation of the presumption—organized or integrated enough to manifest the requisite intent. Furthermore, the evidence of the conduct is logically co-extensive with the evidence which "suffices" to establish the intent. For this reason, the presumption is also virtually irrebuttable.

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[33] Section 45-5-112, Montana Code Annotated.

[34] The Supreme Court ignored the State's contention on appeal that the presumption was not utilized and instead assumed it was, *Cowan, supra*, 861 P.2d at 888.

[35] A presumption which directs or permits the factfinder to presume intent from acts, without more, unconstitutionally shifts the burden of proof, *Sandstrom, supra*, 442 U.S. at 523-24.

The problem is this: there has to be a certain degree of at least partial contact with reality, in order for a person to cause *anything* to happen—whether it be a criminal result, or any other kind of result. An insane person, as well as a sane one, has to understand that you must unlock and open a door to get inside a house, whether it be someone else's house he wishes to enter, or his own—or he will not get in. The very capacity to do harm depends on possessing *some* capacity to act purposely or knowingly, at least at the level of an habitual or unconscious understanding of cause and effect. Insane persons subject to involuntary commitment because they represent "a danger to themselves or others" could not represent any such danger if they did not have the capacity to engage in *some* purposive behavior, like obtaining a sharp knife to cut their own wrists. The subclass of insane persons lacking all capacity to harmonize their motor acts systematically with the material structure of the world, is the class of persons suffering from catatonia—and *these* mentally disordered individuals are never on trial for crimes, because they cannot commit them, being unable to relate systematically to their surroundings in any effective manner.

By statute,[36] Montana purports to permit evidence of a defendant's mental illness to be offered to "prove" that the defendant "did not have a state of mind that is an element of the offense." However, if the trier of fact is permitted to interpret the requisite mental state so that it encompasses any kind of organized or coherent human behavior in any way associated with the doing of the harm that constitutes the crime, then in fact no evidence of mental illness can *ever* "prove" the defendant "did not have" criminal intent—because if the defendant's behavior was harmonious enough with the objective laws of cause and effect to permit him to *do* the harm at

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[36] Section 46-14-102, MCA.

all, then it follows automatically that it was also organized and systematic enough to demonstrate he acted with purpose and knowledge. In this case, the provisions of Section 46-14-102 MCA are nothing but a cruel joke; no one who commits a criminal act can ever be acquitted on grounds of insanity; and the defendant is in a situation where, in fact if not in theory, a conclusive and rigid presumption of intent is operating in every case where insanity evidence is offered, to relieve the prosecution of 100% of its burden to prove criminal intent.[37] *Sandstrom* should apply to this situation as cogently as to one where the operative presumption is more openly stated, rather than having to be deduced.

CONCLUSION

For all of these reasons, and pursuant to U.S. Supreme Court Rule 10.1(c), this decision of the Montana Supreme Court should be reviewed.

Respectfully submitted,

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[37] The present case illustrates precisely how this works. In spite of what can only be described as overwhelming evidence of deranged conduct, in which the picture presented by eyewitnesses of bizarre, senseless, reckless, utterly irrational behavior, fits harmoniously with the clinical picture of paranoid, psychotic, delusional behavior manifesting insanity, the trial Court found that Joe Cowan's conduct was deliberate, and that he "chose" to commit the assault. In the entire record, the only evidence that Joe Cowan "chose" to do what he did is that he did it.

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APPENDIX TABLE OF CONTENTS

DOCUMENT Page

Appendix A
Opinion of the Montana Supreme Court, *State v Cowan*, decided October 6, 1993 ..... 1a

Appendix B
Trial court's Findings of Fact, Conclusions of Law, and Verdict, dated February 12, 1991 ..... 26a

Appendix C
Judgment, dated February 25, 1991 ..... 35a

Appendix D
Montana Supreme Court, Order denying Petition for Rehearing, dated November 4, 1993 ..... 39a

Appendix E
Defense Memorandum of Law, dated December 20, 1990, submitted at the close of evidence at trial 40a

Appendix F
Defense Brief in Support of Motion to Set Aside Verdict, dated January 30, 1991, submitted to trial court before sentencing 50a

Appendix G
Psychiatric Report of Noel Hoell, M.D., defense psychiatrist, dated June 21, 1990 ..... 54a

APPENDIX TABLE OF CONTENTS (continued)

DOCUMENT Page

Appendix H

Psychiatric Report of William D. Stratford, M.D., prosecution psychiatrist, dated August 15, 1990 ..... 60a

Appendix I

State Mental Hospital Psychiatric Report on Defendant, dated November 26, 1990 ..... 71a

Appendix J

Transcript of Prosecution Clinical Psychologist Dr. Herman Walters' Trial Testimony Regarding Diagnosis of Defendant, Ruling Out Possibility of Malingering; Defendant's State of Mind at Time of Assault, December 20, 1990 [Tr. 434-447] 80a

Appendix K

Predominant features of schizophrenia, American Psychiatric Association, Diagnostic and Statistical Manual, DSM-III-R, 1990 (pages 187-192) 90a

Appendix L

Legal Status of Abolition of the Insanity Defense, from ABA Criminal Justice Mental Health Standards, American Bar Association, 1989 (pages 336-338)..... 101a

APPENDIX A

No. 91-289

IN THE SUPREME COURT
OF THE STATE OF MONTANA
1993

STATE OF MONTANA,
Plaintiff and Respondent,

v

JOE JUNIOR COWAN,
Defendant and Appellant.

APPEAL FROM: District Court of the Fourth Judicial District, In and for the County of Missoula, The Honorable Ed McLean, Judge presiding.

COUNSEL OF RECORD:

For Appellant:
Margaret L. Borg and
William Boggs, Missoula

For Respondent:
Hon. Marc Racicot, Attorney General;
Barbara Harris, Assistant Attorney General, Helena
Robert L. Deschamps III, County Attorney, Missoula

Submitted: April 4, 1993
Filed: October 6, 1993
Decided: October 6, 1993

Ed Smith
Clerk

Chief Justice J. A. Turnage delivered the Opinion of the Court.

The District Court for the Fourth Judicial District, Missoula County, sitting as the trier of fact, convicted Joe Junior Cowan of aggravated burglary and attempted deliberate homicide. He appeals. We affirm.

The issues are:

1. Did the State prove the mental element of the crimes of attempted deliberate homicide and aggravated burglary beyond a reasonable doubt?

2. Do the Montana statutes governing the presentation of evidence of mental disease or defect in effect establish a conclusive or unrebuttable presumption of criminal intent in contravention of the doctrine enunciated in *Sandstrom v Montana*?

3. Does sentencing and confining Cowan to prison violate the Eighth and Fourteenth Amendments to the United States Constitution because of his mental condition?

On April 23 or 24, 1990, Joe Junior Cowan broke into a United States Forest Service cabin at the Lolo Work Center, eighteen miles west of Lolo, Montana. When the occupant of the cabin came home on the evening of the 24th, it was clear to her that someone had been in her cabin eating her food, watching her television, and generally making himself at home. She called "911" and locked her doors before Cowan again broke in and assaulted her with a treeplanting tool called a hodag.

Sheriff's deputies responding to the victim's phone call apprehended Cowan at the Work Center. He had in

his possession a backpack containing some of the victim's belongings. He did not resist arrest. The victim was found semi-conscious on the floor of her kitchen. She survived, despite injuries including a punctured lung, broken ribs, a broken scapula, a dislocated shoulder, and a skull fracture.

Cowan has been diagnosed as suffering from paranoid schizophrenia, a serious mental disorder. Prior to trial, he was evaluated by psychiatrists and found competent to stand trial.

Cowan waived his right to a jury trial. At his bench trial, he argued that he did not act deliberately in committing these offenses. He asserts that he was in an acute psychotic episode at the time of the attack and that he was under the delusion that the victim was a robot, not a human being. Mental health professionals testified for both Cowan and the State on this issue. The court found Cowan guilty as charged.

At Cowan's sentencing hearing, the court heard argument about whether he should be confined in a prison or a mental institution. The court ordered him committed to the custody of the Montana Department of Institutions "for placement in a facility deemed appropriate to [his] need for treatment and society's need for protection from [him]."

I.

Did the State prove the mental element of the crimes of attempted deliberate homicide and aggravated burglary beyond a reasonable doubt?

Our standard of review is whether, viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found Cowan guilty beyond a reasonable doubt of the crimes with which he was charged. *State v Bower* (1992), 254 Mont. 1, 6, 833

P.2d 1106, 1110. The charge of attempted deliberate homicide required proof that Cowan purposely or knowingly attempted to cause the death of another human being. Sections 45-4-103 and 45-5-102, MCA. The aggravated burglary charge required proof that he knowingly entered or remained in an occupied structure with the purpose to commit an offense and was armed with a weapon. Section 45-6-204(2)(a), MCA. Cowan concedes the conduct elements of both offenses. He challenges the finding that he acted knowingly or purposely.

"Knowingly" and "purposely" are defined at § 45-2-101(33) and (58), MCA:

> (33) "Knowingly"—a person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware of his conduct or that the circumstance exists. A person acts knowingly with respect to the result of conduct described by a statute defining an offense when he is aware that it is highly probable that such result will be caused by his conduct. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence. Equivalent terms such as "knowing" or "with knowledge" have the same meaning.
>
> (58) "Purposely"—a person acts purposely with respect to a result or to conduct described by a statute defining an offense if it is his conscious object to engage in that conduct or to cause that result. When a particular purpose is an element of an offense, the element is established although such purpose is conditional, unless the

condition negatives the harm or evil sought to be prevented by the law defining the offense. Equivalent terms such as "purpose" and "with the purpose" have the same meaning.

Cowan contends the most conservative conclusion one could draw from the expert testimony in this case is that it clearly raised a reasonable doubt about whether he acted deliberately in committing the offenses. He cites the evidence that he had suffered for years from a serious mental disorder, paranoid schizophrenia. A psychologist testified on behalf of Cowan that there was "reasonable scientific evidence" that he was suffering an acute psychotic episode at the time of the incident. The psychologist who appeared on behalf of the State testified that "the presence of his disorder...plus that kind of behavior certainly raised the possibility of psychosis at that time."

However, the expert testimony concerning whether Cowan was in a psychotic episode at the time of the attack was less than unequivocal. Exaggeration of symptoms was a concern. It was not until his third interview with the State's psychologist that Cowan stated he was under a delusion that the victim was a robot at the time of the attack. Before that, he described her as a "large white woman" who looked stronger than he was.

The experts testified that Cowan's paranoid schizophrenia is episodic and that it waxes and wanes. They testified that they could not determine with certainty whether Cowan was in the midst of a psychotic episode at the time of the attack. Also, the State's expert testified that Cowan's intelligence, motive, and past experiences were sufficient to enable him to falsify symptoms of psychosis. One of Cowan's experts testified that Cowan had a history of "going into places that belonged to other people and just basically hanging around for a while and

eating."

The expert witnesses also testified that Cowan had a history of assaults on females and had been through the criminal process before. The psychologist who testified for Cowan admitted that, according to the diagnostic manual he used, malingering should be strongly suspected in certain circumstances, including if the patient is referred in a legal context or if the person has antisocial personality disorders. He also testified that, in answer to a question in a psychological test, Cowan stated that he frequently lies to get out of trouble.

The weight of evidence and the credibility of witnesses are within the province of the trier of fact. *State v Whitcher* (1991), 248 Mont. 183, 188, 810 P.2d 751, 754. A factfinder may find credible some, all, or none of the testimony of any witness. *State v LeDuc* (1931), 89 Mont. 545, 562, 300 P. 919, 926. As the trier of fact in this case, the court could have, for example, found credible the evidence that Cowan suffers from paranoid schizophrenia but disbelieved that Cowan was in a psychotic state which prevented him from acting knowingly or purposely on April 24, 1990.

Moreover, the issue before the court in the trial phase of this action was not whether Cowan was in a psychotic state, but, as stated above, whether he acted purposely or knowingly. The existence of a mental disease or defect in a person does not necessarily preclude the person from acting purposely or knowingly. *State v Byers* (Mont. 1993), _ P.2d _ , _ , _ St.Rep._ , citing *State v Korell* (1984), 213 Mont. 316, 690 P.2d 992.

The State's expert felt that, on April 24, 1990, Cowan was able to act with purpose or knowledge. Cowan's expert psychiatrist agreed that eyewitness testimony is as important in determining what a person was feeling or thinking at a particular time as is the

testimony of experts. He did not obtain information from eyewitnesses before rendering his opinion, however.

Cowan states that the eyewitness testimony of the victim and the officers who arrested him describes bizarre, senseless, reckless, and terrifying behavior. He refers to his actions of trying to tear the license plates off the victim's car prior to attacking her, approaching the victim even when he could see she had a shotgun pointed at him, and, when the authorities arrived, running from them only to retrieve his backpack.

A deputy county sheriff who talked to Cowan and offered him a ride on the day before the attack, near the Work Center, stated that Cowan was coherent and able to carry on a normal conversation then. Cowan told the officer he planned on camping in the area. At the time of the attack, Cowan was lucid enough to be able to eavesdrop on the victim's telephone call to "911" from an extension phone in another building. He was rational enough to slash the tires on the victim's car and to use a tool to break through the locked front door of her cabin after finding all the doors to the cabin locked. The victim described Cowan circling her cabin before he broke in, mocking her pleas to leave and to let her go. She described his facial expression as "mad, angry, serious." He called her a "society bitch," in addition to calling her, as the defense points out, a "robot bitch." After he entered the cabin, and in the midst of assaulting her with the hodag, he wrestled the shotgun away from her and attempted to shoot her with it.

The District Court found that, prior to his attack on the victim, Cowan had made no statements or comments to mental health care givers indicating a delusional belief system involving the existence of robots disguised as humans. There is no evidence to the contrary in the trial transcript. The court further found that, in discussing the attack with mental health profes-

sionals, Cowan has referred to the victim as "she," "her," and a "white woman." That finding is supported in the record. The court then found that, during the attack, Cowan "was conscious of the fact that [the victim] was a human woman."

After reviewing the record, and viewing it in a light most favorable to the prosecution, we conclude that a rational trier of fact could have found beyond a reasonable doubt that Cowan possessed the requisite mental state to be convicted of the crimes with which he was charged.

II

Do the Montana statutes governing the presentation of evidence of mental disease or defect in effect establish a conclusive or unrebuttable presumption of criminal intent in contravention of the doctrine enunciated in *Sandstrom v Montana*?

In *Sandstrom v Montana* (1979), 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39, the United States Supreme Court established that the Due Process Clause prohibits the use of a presumption which relieves the prosecution of the burden of proving mental state by requiring an inference of the existence of criminal intent from the fact of criminal conduct. In that case, the impermissible presumption was embodied in a jury instruction which recited statutory language providing that "a person intends the ordinary consequences of his voluntary acts."

Because this case was tried to the court, there were no jury instructions. Cowan bases his argument on statutes upon which he believes the court must have relied.

Evidence of a mental disease or defect is admissible in Montana under § 46-14-102, MCA, to prove that

a criminal defendant did or did not have a state of mind that is an element of a charged offense. Cowan argues that because mental disease or defect does not, however, constitute a valid defense to a criminal charge in Montana, a conclusive presumption is established as to mental state in violation of the Due Process Clause as discussed in *Sandstrom*.

Cowan also argues that the court must have applied § 45-5-112, MCA. That statute provides that "[i]n a deliberate homicide, knowledge or purpose may be inferred from the fact that the accused committed a homicide and no circumstances of mitigation, excuse, or justification appear." Cowan argues that if any evidence of organized or integrated conduct will suffice to establish criminal intent beyond a reasonable doubt, in spite of clear manifestations of insanity, then no one who commits a criminal act can ever be acquitted on grounds of insanity because it would be impossible for anyone to cause harm without engaging in a minimal level of organized conduct.

We have previously affirmed the constitutionality of the abolition of the insanity defense in terms of violation of the right to due process. *Byers*, _P.2d at _ ; *Korell*, 690 P.2d at 1002. As we noted in *Byers* and *Korell*, the United States Supreme Court has determined that the Due Process Clause does not require the use of any particular insanity test or allocation of burden of proof. *Leland v Oregon* (1952), 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302, reh. denied, 344 U.S. 848.

Section 45-5-112, MCA, provides that any evidence of organized or integrated conduct <u>may</u> suffice to establish criminal intent in a deliberate homicide beyond a reasonable doubt. The ultimate determination is left to the finder of fact. Section 45-5-112, MCA, establishes a permissive inference, not a conclusive presumption. A statute establishing a permissive inference does

not violate the rule stated in *Sandstrom*. See *State v Woods* (1983), 203 Mont. 401, 415, 662 P.2d 579, 586; *State v Coleman* (1979), 185 Mont. 299, 397-98, 605 P.2d 1000, 1052-53, cert. denied, 446 U.S. 970, reh. denied, 448 U.S. 914.

We hold that the Montana statutes governing the presentation of evidence of mental disease or defect do not establish a conclusive or unrebuttable presumption of criminal intent in contravention of the doctrine enunciated in *Sandstrom*.

III

Does sentencing and confining Cowan to prison violate the Eighth and Fourteenth Amendments to the United States Constitution because of his mental condition?

Cowan states that it is inhumane to consider the insanity of a person accused of a crime only to reduce the degree of the crime or the punishment therefor. He argues that sentencing an insane person like himself to the law-of-the-jungle conditions in prison is essentially a death sentence. He cites *People v Skinner* (Cal. 1985), 704 P.2d 752. In that case, the California Supreme Court stated that the M'Naghten test of insanity, which has been used since 1850, reflects a fundamental principle of criminal law. *Skinner*, 704 P.2d at 759.

We decline to adopt the reasoning of the California Supreme Court in *Skinner*. As we stated above, the United States Supreme Court has not required the use of any specific insanity test for purposes of due process. Montana's law allows consideration of a defendant's mental disease or defect at three stages—determination of fitness to stand trial, at trial to disprove state of mind, and at sentencing. *Korell*, 690 P.2d at 996-97. This Court has further explained:

> The [Montana] legislature has made a *conscious* decision to hold individuals who act with a proven criminal state of mind accountable for their acts, regardless of motivation or mental condition. Arguably, this policy does not further criminal justice goals of deterrence and prevention in cases where an accused suffers from a mental disease that renders him incapable of appreciating the criminality of his conduct. However, the policy does further goals of protection of society and education...
>
> Our legislature has acted to assure that the attendant stigma of a criminal conviction is mitigated by the sentencing judge's personal consideration of the defendant's mental condition and provision for commitment to an appropriate institution for treatment, as an alternative to a sentence of imprisonment.
>
> —Korell, 690 P.2d at 1002.

We reiterate that Cowan was not sentenced to prison, but was placed in the custody of the Department of Institutions. The court specifically stated its purpose to provide for treatment of Cowan's mental illness at a different facility if the Director of the Department of Institutions determines treatment at a different facility is needed.

We hold that the sentence imposed by the District Court does not violate the Eighth and Fourteenth Amendments to the United States Constitution.

Affirmed.

J.A. Turnage, Chief Justice

We concur:

John Conway Harrison
Karla M. Gray
Fred Weber
R.C. McDonough
Justices

Justice Terry N. Trieweiler dissenting.

I dissent from the majority opinion.

I conclude that Montana's abolition of the insanity defense in 1979 violated the defendant's right to due process of law guaranteed under the Fourteenth Amendment to the United States Constitution, and Article II, Section 17, of the Montana Constitution.

Based on the Legislature's abolition of the insanity defense in 1979, and this Court's approval of that change, a person in Montana can be convicted of serious crimes and sentenced to confinement in the State Prison (in this case for a period of up to 60 years), even though at the time of the acts with which they are charged they were unable to appreciate the criminality of their conduct or were unable to conform their conduct to the requirements of the law because of mental illness. This result flies in the face of those notions of fundamental fairness which have been universally accepted by civilized societies subscribing to English notions of justice for the past 700 years.

Furthermore, I disagree with the majority's reliance on the United States Supreme Court's decision in *Leland v State of Oregon* (1952), 343 U.S. 790, 72 S. Ct. 1002, 96 L. Ed. 1302. While that Court did hold in that case that the defendant was not constitutionally entitled to a specific form of the insanity defense, it is implicit from that decision that some form of insanity defense is required by the due process clause. In fact, subsequent

to this Court's decision in *State vKorell (1984)*, 213 Mont 316, 690 F.2d 992, the California Supreme Court cited *Leland* for exactly the opposite purpose for which it is cited by this Court. In *People v Skinner* (Cal. 1985), 704 P.2d 752, the California Supreme Court, while discussing the due process dimensions of the insanity defense, stated that:

> Because mens rea or wrongful intent is a fundamental aspect of criminal law, the suggestion that a defendant whose mental illness results in inability to appreciate that his act is wrongful could be punished by death or imprisonment raises serious questions of constitutional dimension under both the due process and cruel and unusual punishment provisions of the Constitution. In *Leland v Oregon* (1952), 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302, the court upheld an Oregon law placing the burden of proving insanity beyond a reasonable doubt on the defendant and affirmed the right of the state to formulate the applicable test of legal insanity. In so doing, however, the court measured the law under due process standards, concluding that the irresistible impulse extension of traditional insanity test was not "'implicit in the concept of ordered liberty.'" (343 U.S. at p. 801, 72 S.Ct. at 1009). The court thus seemingly accepted the proposition that the insanity defense, in some formulation, is required by due process. (See also *Robinson v California* (1962), 370 U.S. 660, 666, 82 S.Ct. 1417, 1420, 8 L.Ed.2d 758, suggesting that punishment for the status of being mentally ill would constitute cruel and unusual punishment.) Scholars, too,

> suggest that abolition of the traditional insanity defense may be constitutionally impermissible if the result would be imposition of punishment on a mentally ill person for acts done without criminal intent. (See Robitscher & Haynes, *In Defense of the Insanity Defense* (1982) 31 Emory L.J. 9; Note, *The Proposed Federal Insanity Defense: Should the Quality of Mercy Suffer for the Sake of Safety* (1984) 22 Am.Crim.L.Rev. 49.)
>
> This court suggested a similar view in *People v Coleman* (1942), 20 Cal.2d 399, 407, 126 P.2d 349, where we observed: "Obviously an insane person accused of crime would be inhumanely dealt with if his insanity were considered merely to reduce the degree of his crime or the punishment therefor."
>
> —*Skinner*, 704 P.2d at 757-58.

Montana's statutory scheme for dealing with mental illness does exactly what the California Supreme Court suggests would violate due process and cruel and unusual punishment provisions of the Constitution. It allows for conviction and punishment of those who are unable to appreciate the criminality of their conduct, and substitutes for the insanity defense the mere option of the district court to take mental illness into consideration when deciding the degree of punishment or nature of confinement.

While evidence of mental disease or defect is admissible to prove that a defendant did not have a state of mind that is an element of the offense, it is clear that Montana's law does not take into consideration the defendant's ability to appreciate the criminality of his

conduct or conform his conduct to the law. The only state of mind that had to be proven to convict the defendant in this case was that he acted knowingly and purposely at the time of the illegal conduct with which he is charged. Based on Montana's definitions of knowingly and purposely, he could act with both states of mind and still not appreciate the criminality of his conduct nor be able to conform his conduct to the law. The facts of this case are a perfect example.

The behavior of defendant, as described by the victim of his brutal conduct, was nothing less than bizarre and irrational. While he circled her house looking for a point of entry, he referred to her as a "robot bitch." He kicked at her car and inexplicably pulled at her license plate. He flattened all four tires of her vehicle, but made no effort to remove the keys from the ignition. When the victim demanded that defendant leave the premises, he would grunt and mimic her. However, most of what he said was unintelligible. When he did finally gain entry to the house, she pointed a gun at him and pulled the trigger. However, he was undeterred by the threat from her gun. When the victim asked defendant who he was and what he wanted, he would simply mimic her by repeating what she said. She also recalled that he told her she was in his house and that she should get out of his house.

After defendant's assault on his victim and the arrival of at least two Missoula County Deputy Sheriffs, defendant was observed by one of those deputies in front of the mess hall near the building where the assault occurred. That deputy, who was armed, told him to stop. However, again disregarding the threat to his safety, he ran around to the back of the building where he retrieved his backpack. The deputy followed him to the back of the building where she found him standing with his backpack. After that point in time, he obeyed all of the deputy's instructions.

Defendant was examined by numerous psychologists and psychiatrists prior to trial. One psychiatrist and two clinical psychologists gave testimony at trial. Everyone who examined defendant concluded that he was suffering from paranoid schizophrenia, a form of mental disease, which even the State's psychologist conceded may have precluded defendant from understanding and appreciating the criminality of his conduct at the time of the crime with which he was charged.

Dr. Noel Hoell testified that he was a psychiatrist practicing in Missoula who interviewed defendant, reviewed his previous medical records from North Carolina, and did a mental status evaluation. From his investigation, he learned that defendant had been hospitalized on a number of previous occasions with diagnoses of depression, having psychotic features, and schizophrenic disorder. He concluded from his own examination that defendant suffered from serious mental illness which he diagnosed as schizophrenia. He testified that common symptoms of schizophrenia are hallucinations, delusions, and paranoid ideas. He said that it is a psychotic disorder which implies a break in one's ability to understand and deal with reality. His diagnosis was illustrated by his conversations with defendant during which he stated that defendant displayed delusional thinking and talked about people being programmed by religious groups and the government to control their behavior.

Dr. Hoell reviewed the records from defendant's evaluation at the Montana State Hospital and found nothing inconsistent in the State's evaluation.

Dr. Hoell learned from his interview with defendant that defendant thought he was on his own property at the time of his assault on the victim, and also believed that the victim was not really a human being, but believed she was a mechanical robot. He testified that

defendant felt endangered by the victim when she began yelling and screaming in a menacing sort of way.

Most importantly, Dr. Hoell testified that, in his opinion, defendant was in a psychotic state at the time that he attacked his victim. In that state, he could not understand or deal with reality because of hallucinations, delusions, and misinterpretation of events. He could satisfy Montana's requisite mental state because he could make a decision about what he was doing within his own sense of reality. In other words, he could act with purpose and knowledge. However, Dr. Hoell testified that because of defendant's mental defect, he did not appreciate the nature of his attack on the victim and was not able to appreciate the criminality of his conduct. In fact, it was Dr. Hoell's opinion that defendant did not even appreciate that the death of a human being was a potential result of his conduct.

Robert A. Shea was a clinical psychologist in Missoula who examined defendant at the request of the public defender's office. He reviewed the history of defendant's mental disease, and found that it was progressive. He reviewed the records of Dr. Will Stratford, Herman Walters, Ph.D., and the psychiatrist who examined defendant at the State Mental Hospital, and stated that they had all, likewise, diagnosed paranoid schizophrenia.

Dr. Shea interviewed the victim of defendant's attack and custodial people at the Missoula County Jail to learn about defendant's behavior. They described it as crazy and weird. On occasion, he was observed hiding underneath his bunk with the mattress wrapped around himself.

From April 25, when Dr. Shea first examined defendant, until September 2, he saw defendant's behavior deteriorate to a point where he became concerned

about defendant's ability to aid in his own defense. When he finally was able to get defendant to talk about the incident with which he was charged, defendant told him he had been defending himself against a robot. There was nothing in the conversations to suggest to Shea that defendant thought he was dealing with a human being.

According to Shea, defendant even had some concerns that his own attorney might be a robot.

Shea's diagnosis was also paranoid schizophrenia.

He testified that while acting in a psychotic schizophrenic state, defendant could act with purpose and could act knowingly, as those terms are defined in Montana's criminal code. However, at the same time, defendant would not be able to understand the real implications of his conduct because of the delusions under which he would have acted. It was Shea's opinion that on the night of the conduct which formed the basis of criminal charges against defendant, he was suffering from a mental disease or defect which prevented him from understanding the nature of the act he was committing and appreciating the criminality of his conduct, even though he was capable of acting purposely and knowingly while he thought he was defending himself against a robot.

Dr. Herman Walters, a clinical psychologist from the University of Montana, was retained by the State to consult with Dr. Will Stratford for purposes of evaluating defendant. He and Stratford, likewise, diagnosed defendant with paranoid schizophrenia. Although he stated it would be difficult to state what a person's mental condition was at some point in the past, he stated that defendant's thoughts were disordered and that he was acting in a delusional fashion during his third interview with him. He testified that it was possible that defendant

was delusional or psychotic at the time of the incident, but he could not say for sure. He did explain that if defendant had been delusional, his conduct would have been based on false assumptions and false premises. Most importantly, Dr. Walters testified that in a delusional state, defendant could act purposely and knowingly and still not be able to appreciate the criminality of his conduct.

There was no testimony from any witness to controvert the expert medical opinion that, because of serious mental disease, defendant was unable to appreciate the criminality of his conduct at the time that he assaulted his victim.

The result in this case is the worst case scenario anticipated by national critics of Montana's insanity laws and brought to this Court's attention in Justice Sheehy's dissent to our decision in *Korell*. There, he brought the following illustration to our attention:

> "Yet the issue of criminal blameworthiness should require a deeper inquiry. Implicit in this concept is a certain *quality* of knowledge and intent, going beyond a minimal awareness and purposefulness. Otherwise, for example, a defendant who knowingly and intentionally kills his son under the psychotic delusion that he is the biblical Abraham and his son, the biblical Isaac, could be held criminally responsible. The Montana, Idaho and Utah enactments, on their face, would deny a defense to such a defendant." American Bar Association, Standing Committee on Association Standards for Criminal Justice, Report to the House of Delegates, August, 1984, Standard 7-6.1, Commentary P. 327.

> Thus has Montana's abolition of the insanity defense in 1979 been-held up for criticism and disrespect by national authorities and scholars.
>
> —*Korell*, 690 P.2d at 1009.

The majority's conclusion that abolition of the insanity defense does not violate the due process clauses of the Montana or Federal Constitutions is based largely on its prior decision in *Korell*, and that decision's interpretation of *Leland* .

The inadequacy of this Court's decision in *Korell*, and the inaccuracy of its analysis of *Leland* is thoroughly set forth by the dissenting opinion of Justice McDevitt in *State v Searcy* (Idaho 1990), 798 P.2d 914. I agree with that analysis, and would follow it in this case.

As pointed out in the *Searcy* opinion, there are no U.S. Supreme Court decisions which directly address the issue of whether the insanity defense can constitutionally be abolished. The reason is that there are only three states which do not currently permit an insanity defense. However, as noted by the majority in *Korell:*

> Three older state court decisions have found state statutes abolishing the insanity defense to be unconstitutional. *State v Lang* (1929), 168 La. 958, 123 So. 639; *Sinclair v State* (1931), 161 Miss. 142, 132 So. 581; *State v Strasburg* (1910), 60 Wash. 106, 110 P. 1020.
>
> —*Korell*, 690 P.2d at 999.

The majority distinguishes these decisions because the statutory schemes under attack in those cases did not permit introduction of mental disease for the limited

purposes for which such evidence is allowed under our statutory scheme. However, I find that distinction unpersuasive.

The only reported decision outside of Montana which I am familiar with and which specifically upholds abolition of the insanity defense is the majority opinion in *Searcy*. In his well-documented opinion dissenting from that decision, Justice McDevitt made several important points.

First, he examined the various tests for due process that have been set forth over the years. He observed that:

> In *Palko v Connecticut*, 302 U.S. 319, 324-25, 58 S.Ct. 149, 151-52, 82 L.Ed. 288 (1937), Justice Cardozo wrote that those particulars of the Bill of Rights which must be held to apply as against the States through the Fourteenth Amendment Due Process Clause are those which "have been found to be implicit in the concept of ordered liberty, . . ." such that "a fair and enlightened system of justice would be impossible without them."
>
> —*Searcy*, 798 P.2d at 927.

He noted that:

> The underlying theme of these various formulations of "due process" is a sense of historical precedent upon which American institutions were founded and our continuing legal traditions. Thus, the proper focus in evaluating the place of a particular doctrine in the concept of due

> process is the pervasiveness of the doctrine in the history of the common law. A review of the extensive history of the insanity defense in the law of England and the United States leads to the conclusion that due process does require the availability of that defense to criminal defendants.
>
> —*Searcy*, 798 P.2d at 928.

As noted in Justice McDevitt's dissent, the insanity defense has existed as an excuse to crime from the time of the reign of Edward I during the 13th Century, and was well established by the 16th Century. *Searcy*, 798 P.2d at 928-29. He pointed out that as early as the 18th Century there was recorded case law to the effect that a man deprived of reason cannot be guilty. The jury was so instructed in *Rex v Arnold*, 16 How.St.Tr. 695 (1724). American cases closely tracked English law from the time that insanity was first considered as a defense in this Country's courts. *In re Clark*, 1 City Hall Recorder (N.Y.) 176 (1816), and *In re Ball*, 2 City Hall Recorder (N.Y.) 85 (1817).

Then, in 1843, *M'Naughten's Case*, 8 Eng.Rep. 718 (H.L. 1843), was decided. That case provided that a person suffering from disease of the mind, to the extent that they did not know the nature and quality of their conduct, or did not know that what they were doing was wrong, could not be guilty of a crime. The *M'Naughten* rule, in some form or another, has been followed in virtually every American jurisdiction until 1979. However, whether following the *M'Naughten* rule, or some other variation of the insanity defense, McDevitt points out that the appropriateness of the defense has rarely been questioned.

Second, McDevitt pointed out that there were three legislative attempts to abolish the insanity defense

between 1910 and 1931, but that each of those legislative enactments were overturned by the state supreme courts where they were attempted. *Seacy*, 798 P.2d at 932. Referring to this Court's discussion of those decisions in *Korell*, Justice McDevitt pointed out that:

> The Montana Supreme Court, in its recent decision upholding the 1979 abolition of the defense in Montana, effortlessly distinguished those three cases because "[t]hey interpret statutes that precluded *any* trial testimony of mental condition, including that which would cast doubt on the defendant's state of mind at the time he committed the charged offense." *Korell*, 213 Mont. at 329, 690 P.2d at 999 (emphasis in original). The *Korell* court felt that Montana's allowance for psychiatric evidence going to the issue of *mens rea* at trial removed any precedential value from those three prior cases. However, I believe that two of those cases have greater applicability to the issues faced in *Korell* and by this Court than the Montana Supreme Court would allow.
>
> —*Searcy*, 798 P.2d at 932.

For the reasons mentioned by the dissent in *Searcy*, I agree.

Finally, the dissenting opinion in *Searcy* points out that:

> Another, albeit less authoritative, test of whether a particular doctrine is "implicit in the concept of ordered liberty" other than the history of the legal concept, is the

> unanimity with which the doctrine is adopted among American jurisdictions. With the exception of the three attempted legislative abolitions of the insanity defense noted above, and the recent rejections of the defense in Montana (1979), Idaho (1982), and Utah (1983), the insanity defense has been universally accepted in all American jurisdictions throughout this nation's history.
>
> —*Searcy*, 798 P.2d at 934.

Based upon the foregoing, and based on the inapplicability of those authorities relied upon by the majority of the Idaho Supreme Court and the majority of this Court, the dissent in *Searcy* concluded that:

> I believe it is evident that the defense has an independent existence of sufficient duration and significance to entitle it to a place in our American concept of "ordered liberty."
>
> —*Searcy*, 798 P.2d at 927.

I agree.

I believe as strongly as anyone that innocent people must be protected from those who are a danger to society, whether their behavior results from mental disease or simply an antisocial personality. However, the alternative to imprisoning those whose behavior results from insanity, over which they have no control, is not to turn them loose on society. Our law prior to 1979 provided that when a defendant is acquitted based on the defense of mental disease or defect, he or she must be committed to the custody of the superintendent of the Montana State Hospital for so long as they remain

a threat to society. Section 95-508, R.C.M. (1947). That procedural safeguard has been carried forward to our current statutory scheme. Section 46-14-301, MCA.

However, at a time of serious prison overcrowding, the unavailability of public funds with which to build new prisons, and obvious administrative problems controlling current prison populations, the last thing in the world that makes sense is to use prisons as warehouses for the insane. That obvious conclusion, by itself, is a matter of public policy which should normally be of no concern to the judiciary. But, when using prisons to house the insane results from a denial of the due process which is guaranteed under our State and Federal Constitutions, it should be of concern to the judiciary. I conclude that the abolition of the insanity defense in Montana is, for the reasons previously mentioned, a violation of due process. Joe Junior Cowan is certifiably insane and it was uncontroverted that at the time of the acts with which he was charged, he did not understand that his conduct was wrong or illegal. While the interests and safety of society may require that he be institutionalized for the rest of his life, or the duration of his mental illness, centuries-old standards of decency prohibit his conviction and placement in the Montana State Prison for an act which he could not appreciate was illegal. Therefore, I would reverse the judgment of the District Court.

Terry Trieweiler, Justice

Justice William E. Hunt, Sr., joins in the foregoing dissent.

William E. Hunt, Justice

APPENDIX B

Hon. Ed McLean
Montana Fourth Judicial District,
Missoula County Courthouse
Missoula, Montana 59802

MONTANA FOURTH JUDICIAL DISTRICT COURT,
MISSOULA COUNTY

STATE OF MONTANA, Plaintiff, -vs- JOE JUNIOR COWAN, Defendant.	Cause No. 9238/183 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND VERDICT.

This matter came on regularly for bench trial on December 17, 1990 and continuing through December 20, 1990, with Defendant appearing in person and with his attorneys Margaret Borg and Dirk Beccarri, and the Plaintiff appearing through Robert S. Anderson, Deputy Missoula County Attorney. Sworn testimony and physical evidence was presented. The Court now makes the following Findings of Fact and Conclusions of Law and Verdict:

FINDINGS OF FACT

1. The Defendant, Joe Junior Cowan, (hereinafter referred to as the Defendant), is a 31 year old African-American male who was charged by Information with the crimes of Attempted Deliberate Homicide, a felony, as specified in Section 45-4-103, M.C.A. and Section 45-5-102, M.C.A.; and Aggravated Burglary, a felony, as specified in Section 45-6-204, M.C.A.

2. For the past several years, Margaret Doherty, a 29 year old caucasian female, has been a full-time employee of the U.S. Forest Service. During this period, and through the month of April 1990, Ms. Doherty lived at the U.S. Forest Service Lolo Work Center (hereinafter referred to as the "Work Center") located on U.S. Highway 12 in Missoula County, Montana. The Work Center comprised of a cluster of buildings including a residence building, cookhouse and bunkhouse. The buildings share a common telephone line. Ms. Doherty lived in the residence building, and was the sole authorized tenant of the Work Center on April 23 and 24, 1990.

3. During the daylight hours of April 23, 1990, the Defendant was observed by Missoula County Deputy Sheriff Stanley Fullerton walking north along the shoulder of U.S. Highway 12 a few miles south of the Work Center. Deputy Fullerton conducted a routine field interview of the Defendant lasting several minutes, during which the Defendant identified himself and told Deputy Fullerton that he was from North Carolina. The Defendant also told Deputy Fullerton that he was hitchhiking toward Idaho and planned to camp out at an unspecified location in the area that evening. Deputy Fullerton observed that the Defendant's belongings were stored in a black plastic trash bag which he carried with him. During the interview the Defendant seemed calm, well-oriented, intelligent and articulate. The Defendant was able to understand Deputy Fullerton easily, answer his questions accurately and exhibited no behavior indicating to Deputy Fullerton that the Defendant suffered from any mental impairment. Deputy Fullerton offered to give the Defendant a ride back to Missoula, which the Defendant refused.

4. During the early evening of April 23, 1990, the Defendant approached and entered the residence building at the Work Center. He consumed food within the residence which belonged to Ms. Doherty and spent the

night there.

5. Ms. Doherty spent the night of April 23, 1990 in Seeley Lake, Montana. After work on April 24, 1990, Ms. Doherty returned to the Work Center, arriving alone during daylight hours in the early evening. Ms. Doherty parked her car near the residence building and, and approached the building. As she drew near the residence building she heard noise coming from within her residence which sounded as though the television was turned on. Ms. Doherty looked into her residence through a window but saw no one. She called out a request that anyone nearby identify himself, but received no answer.

6. Ms. Doherty entered the living room of her residence and noticed that the television was on and that the residence was untidy. She saw a Forest Service backpack on the living room floor, along with several items of her personal property. The backpack and her personal property had been moved from other locations within the residence to the living room area. Ms. Doherty also noticed dirty dishes in her kitchen and evidence that someone had been cooking and eating her food.

7. Using a telephone within the residence, Ms. Doherty attempted to call her supervisor and a friend but was unable to get through to these parties. During the second call, Ms. Doherty heard what she thought was someone listening in on a telephone extension from another building in the Work Center. She remarked into the telephone that she intended to call the police.

8. Ms. Doherty dialed the 9-1-1 emergency number, and spoke with an operator there. While on the telephone, Ms. Doherty looked out a window of the residence and observed a black man, whom she identified at trial as the Defendant, leave the nearby cookhouse and approach the residence building. Ms. Doherty then locked both doors the residence.

9. The Defendant approached both the front and rear doors of the residence, tried to turn the knobs, pounded on the doors and attempted unsuccessfully to gain entry to the residence.

10. Ms. Doherty retrieved a shotgun from under a bed within the residence, loaded with noisemaking "cracker" shells, and returned with it to the living room area of the home.

11. The Defendant went to Ms. Doherty's car, parked near the residence, and flattened all four tires of the vehicle.

12. The Defendant again approached the residence and attempted unsuccessfully to enter the residence by turning the doorknobs and pounding on the doors. During this period the Defendant appeared to Ms. Doherty to be angry and upset. Ms. Doherty called through the door to the Defendant asking him to identify himself and state his reason for being at her home. The Defendant responded by calling Ms. Doherty and "robot bitch" and a "society bitch."

13. The Defendant disappeared for a few moments, and was next observed by Ms. Doherty coming toward the residence from the cookhouse carrying a "hoedag" tree-planting tool.

14. The Defendant approached the living room door of the residence and began to pound on the door with the hoedag tool. He broke open the door and entered the residence with the hoedag tool raised.

15. Ms. Doherty was standing at the opposite end of the living room, near the kitchen, when the Defendant entered her home. The Defendant crossed the living room to Ms. Doherty's location with the hoedag tool

raised. She attempted to fire the shotgun at the Defendant, but the weapon did not discharge. She retreated to the back wall of the kitchen, where the Defendant approached her and began striking her with the hoedag.

16. Ms. Doherty raised the shotgun to ward off the blows, but the Defendant was able to strike Ms. Doherty several times about the head and back with the hoedag. Ms. Doherty asked the Defendant to not kill her and to let her leave, but the Defendant did not answer her.

17. After striking Ms. Doherty several times with the hoedag, the Defendant put the hoedag on the floor and seized the shotgun which she held. As the two struggled for control of the weapon, the Defendant pulled the trigger of the gun, but it did not discharge. The Defendant then wrested the shotgun away from Ms. Doherty and discarded it.

18. Ms. Doherty turned away from the Defendant and attempted to open the locked kitchen door of the residence so she might leave the residence. The Defendant picked up the hoedag and struck her several times in the back, head and ribs. Ms. Doherty observed the Defendant pause for a moment and reach for a knife in his pocket. However, the Defendant did not withdraw the knife; instead, he resumed striking Ms. Doherty with the hoedag about the head and back. Ms. Doherty fell to the floor and briefly lost consciousness.

19. Missoula County Deputy Sheriffs Bill Smith and Susan Hintz arrived minutes later. Deputy Smith discovered Ms. Doherty lying inside the kitchen door to the residence. Deputy Hintz discovered the Defendant standing near the cookhouse. After seeing Deputy Hintz, the Defendant ran to the rear of the cookhouse where he was arrested by Deputies Smith and Hintz without incident. At the location where he was arrested, the

deputies discovered the Forest Service backpack from Ms. Doherty's residence, containing a ski jacket and pants later identified by Ms. Doherty as her property which had previously been stored at the residence.

20. Missoula Sheriff's Deputy Howard Reed, who arrived on the scene some minutes later, found a hoedag tool on the ground next to the cookhouse, near where the Defendant was first spotted by Deputy Hintz. The Defendant's clothing was seized and subjected to laboratory analysis, along with the hoedag tool. Both the Defendant's clothing and the hoedag tool were found to contain blood of a type consistent with that of Ms. Doherty and inconsistent with that of the Defendant.

21. During the Defendant's arrest and later transport to the Missoula County Sheriff's Office, he appeared calm, willing to cooperate with Deputies Smith and Hintz, and able to understand and respond to their commands. He exhibited no behavior indicating mental impairment during this period.

22. The Defendant's attack on Ms. Doherty caused her to sustain numerous injuries including: lacerations of the head, back and arm; fractures of the skull, scapula and several ribs; a punctured lung; and a dislocated shoulder. She was flown by Life Flight helicopter from the scene to St. Patrick Hospital where she underwent emergency surgery to repair the damage to her ribs and lung and remained hospitalized for a period of 14 days. As of the date of trial, she had not regained full mental function or full range of motion on her right side and continued to receive medical treatment.

23. In September 1982 the Defendant was convicted in Florida of resisting arrest, a misdemeanor. In September 1987 the Defendant was charged in North Carolina with three counts of assault upon a female, and one count of breaking and entering, all misdemeanors.

His mental condition was evaluated during that period and he was found fit to stand trial for the charges. Following his plea of guilty, he was convicted of the charged crimes.

24. Between 1987 and 1990, the Defendant was an occasional patient at mental health centers in North Carolina where the treating physicians ultimately concluded that he suffers from the mental illness known as schizophrenia, paranoid type.

25. On April 24, 1990, the Defendant suffered from schizophrenia, paranoid type, and also exhibited an antisocial personality disorder. One result of the schizophrenia is that the Defendant occasionally hears voices and may experience delusions. The Defendant's psychosis is episodic in nature, not permanent or continuous. During periods in which the Defendant is not experiencing a psychotic or delusional episode he is conscious of his actions and able to act with knowledge, purpose and deliberation.

26. The Defendant's antisocial personality disorder causes him to occasionally engage in unlawful, aggressive or violent conduct which is unrelated to his schizophrenia or episodic psychosis.

27. Prior to his April 24, 1990 attack upon Ms. Doherty, the Defendant had made no comments or statements to mental health caregivers indicating a delusional belief system involving the existence of "robots" disguised as humans.

28. When referring to his state of mind during the attack, the Defendant has referred to Ms. Doherty as "she" and "her" and has called her a "white woman" during conversations with each evaluating mental health professional in this case.

29. On April 24, 1990, during his forced entry to the Work Center residence building and his attack on Ms. Doherty with the hoedag tool, the Defendant was conscious of the fact that Ms. Doherty was a human woman.

CONCLUSIONS OF LAW

1. On April 24, 1990, the Work Center residence building inhabited by Ms. Doherty at the Work Center was an occupied structure.

2. The Defendant knowingly entered or remained unlawfully within the Work Center residence building on April 24, 1990, and knew at the time that his entry to and subsequent presence within the building were unpermitted and unlawful.

3. During the Defendant's entry into and subsequent presence within the Work Center residence building on April 24, 1990 he intended to commit the offenses of theft and homicide therein.

4. During the Defendant's entry into and subsequent presence within the Work Center residence building on April 24, 1990, he had the purpose to engage in conduct constituting the offense of deliberate homicide and performed acts toward the commission of that offense by striking Ms. Doherty repeatedly with the hoedag tool.

5. While striking Ms. Doherty with the hoedag tool on April 24, 1990 the Defendant knew it was highly probable that the death of a human being would be caused by his attack upon Ms. Doherty with the hoedag tool.

6. During the Defendant's immediate flight from the residence building on April 24, 1990, he was armed

with the hoedag tool.

7. The hoedag tool is a weapon.

VERDICT

The Defendant is hereby adjudged to be GUILTY of Count I, Aggravated Burglary, a felony.

The Defendant is hereby adjudged to be GUILTY of Count II, Attempted Deliberate homicide, a felony.

DATED this 12th day of February, 1991.
Ed McLean,
District Court Judge

APPENDIX C

Edward P. McLean, District Judge
Department No. 1
Fourth Judicial District
Missoula County Courthouse Filed: Feb. 25, 1991
Missoula, MT 59802
(406) 523-4771

MONTANA FOURTH JUDICIAL DISTRICT COURT,
MISSOULA COUNTY

STATE OF MONTANA, Plaintiff, -vs- JOE JUNIOR COWAN, Defendant.	Cause No. 9238/88 JUDGMENT

The above-entitled cause came on regularly before the Court upon the application of Michael Aaron, Deputy County Attorney of Missoula County, State of Montana, for leave to file an Information accusing the Defendant of the crimes of Count I: AGGRAVATED BURGLARY, a Felony, as specified in Section 45-6-204, M.C.A. and Count II: ATTEMPTED DELIBERATE HOMICIDE, a Felony, as specified in Section 45-4-103 and 45-5-102, M.C.A.

Whereupon leave to file the Information having been granted and the Defendant being informed of all of his legal rights, he was duly arraigned, answered to his true name and the reading of the Information was waived.

The Defendant was represented by counsels, Margaret Borg or Dirk Beccari, at all stages of these

proceedings.

The Defendant subsequently waived his right to trial by jury and request a trial before the Court.

Thereafter between the 17th and 20th days of December 1990 a non-jury trial was held wherein the Court found the Defendant GUILTY of both counts as charged in the Information. A pre-sentence investigation was ordered and was performed by Probation Officer Tom Forsyth. His report of that investigation has been reviewed by this Court.

Thereafter the Defendant made a motion to set aside the verdicts of guilty; the matter was briefed by both parties and after reviewing the papers and hearing argument by both the State and Defendant, the motion is denied.

A sentencing hearing was held on February 13, 1991. The Court heard testimony from Probation Officer Forsyth and both the State and Defendant presented argument and recommendations for sentence. Based on the content of the psychological testimony adduced at trial, the subsequent testimony at sentencing, the contents of the pre-sentence report and the argument of the parties, the Court makes the following findings:

1. The Defendant suffers from a mental illness which has been medically classified as schizophrenia, paranoid type.

2. However, while committing the offenses of which he was convicted, the Defendant's medical disorder did not prevent him from appreciating the criminality of his conduct, nor did it make him unable to conform his conduct to the requirements of the law.

3. While committing the offenses of which he was

convicted, the Defendant was aware that what he was doing was unlawful and could have conformed his conduct to the law, but chose not to do so.

4. The Defendant's criminal history and involvement in the attack which formed the basis for current charges demonstrates that he presents a substantial danger to other persons and to society and is highly likely to re-offend if he is not incarcerated for a substantial period of time.

IT IS HEREBY THE JUDGMENT OF THIS COURT that JOE JUNIOR COWAN be and is committed to the custody of the Director of the Department of Institutions for a term of twenty (20) years on Count I and for a terms of sixty (60) years on Count II for placement in a facility deemed appropriate to the Defendant's need for treatment and society's need for protection from this Defendant. Said commitments are to run concurrent with one another.

IT IS FURTHER ORDERED that the Defendant shall be initially placed at the Montana State Prison and incarcerated at that facility until such time as the Director of the Department of Institutions has opportunity to review the matter and determine whether the Defendant's need for treatment requires his placement at a different facility. The Director shall ensure that until such time as the Defendant's condition is reviewed and his treatment assigned to medical personnel within the Department, the Defendant shall continue to be administered psychotropic medication in the type and dosage which is currently prescribed by him.

IT IS FURTHER ORDERED that the Defendant is designated a dangerous offender for the purpose of parole, based on the Court's findings above.

The Defendant shall receive credit for the time

served at Missoula County Jail from April 24, 1990, to date of sentencing, February 13, 1991, for two hundred ninety-six (296) days.

Reasons for sentence and designation under Section 4618-404, M.C.A. are:

> 1. Provide for treatment of the Defendant for his mental illness and to ensure that the Defendant is incarcerated for a period which reflects the danger he poses to society.

The Defendant is remanded to the custody of the Missoula County Sheriff for transportation to the Montana State Prison in Deer Lodge, Montana, for execution of this sentence and Judgment pending the Department's decision about placement of the Defendant.

Any bail posted is hereby exonerated.

Done in open Court this 13th day of February, 1991.
DATED this 25th day of February, 1991.

Edward P. McLean
District Judge

APPENDIX D

IN THE SUPREME COURT
OF THE STATE OF MONTANA

STATE OF MONTANA, Plaintiff and Respondent, v JOE JUNIOR COWAN, Defendant and Appellant	No. 91-289 ORDER

The petition for rehearing is denied.

DATED this 4th day of November, 1993.

J.A. Turnage, Chief Justice

John Conway Harrison

Karla M. Gray

Terry Trieweiler

William E. Hunt Sr.

Fred Weber,
Justices

APPENDIX E

PUBLIC DEFENDER OFFICE
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Telephone: (406) 721-5700
Attorneys for Defendant

MONTANA FOURTH JUDICIAL DISTRICT COURT,
MISSOULA COUNTY

STATE OF MONTANA,
Plaintiff,

—vs—

JOE JUNIOR COWAN,
Defendant.

I. INTRODUCTION

In this bench trial in lieu of jury instructions stating the law to be applied by the factfinder to the facts found, the Court must itself find the facts and determine the principles of law applicable to those facts. This memorandum is submitted by the defense at the close of the evidence for two purposes. One purpose, obviously, is to attempt to provide the Court some assistance in interpreting and applying the legal principles applicable to the evidence the Court has heard in this trial. The second purpose is to set forth the legal contentions of the defense in this case; specifically, the contention that the Montana statutes governing the treatment of criminal insanity contravene the Fourteenth Amendment to the United States Constitution, as well as the Eighth Amend-

ment to the United States Constitution, and consequently, may not be applied as written to the evidence in this case.

II. SECTIONS 46-14-102, 201(2) MCA, ARE UNCONSTITUTIONAL ON THEIR FACE IN THAT THEY ABOLISH THE TRADITIONAL TESTS OF CRIMINAL INSANITY WHICH CONSTITUTE AN INTEGRAL PART OF THE ENGLISH COMMON LAW TRADITION [DUE PROCESS]; AND, AS APPLIED IN THIS CASE HAVE THE CLEAR POTENTIAL TO PERMIT CRIMINAL LIABILITY TO BE IMPOSED UPON AN INSANE PERSON WHOSE INSANITY LED TO HIS CRIMINAL CONDUCT [CRUEL AND UNUSUAL PUNISHMENT].

The traditional test applied in English and American common-law jurisprudence to define insanity as a defense in criminal cases is the M'Naghten Rule, the modern formulation of which was set forth by the California Supreme Court in *People v Skinner*, 704 P.2d 752, 753 (California 1985):

> "[T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." [italics in original]

An alternative modern definition of criminal insanity supporting a verdict of not guilty by reason of insanity, is that found in the A.L.I. Model Penal Code, and adopted by statute or Court decision in a great number of states. ALI-MPC, Section 4.01 provides as follows:

> "A person is not responsible for criminal conduct if at the time of the conduct, as a result of mental disease or defect, he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law."

Although nearly all American jurisdictions (including the entire federal system) use either the M'Naghten Rule or the ALI formulation in assessing the relationship of a defendant's insanity to his criminal liability, a few jurisdictions have attempted to narrow or restrict the so-called "insanity defense." A good example is Alaska, whose legislature repealed the ALI formulation in 1982 and in its place enacted AS 12.47.010, which provides as follows:

> "In a prosecution for a crime, it is an affirmative defense that when the defendant engaged in the criminal conduct, the defendant was unable, as a result of a mental disease or defect, to appreciate the nature and quality of that conduct."

See *Hart v State*, 702 P.2d 651, 653 (AK 1985)

This very restricted insanity defense established by the state of Alaska appears to be the most radical departure from the traditional rules relating to the determination of criminal insanity attempted by an American jurisdiction—except Montana.

In 1979, the Montana legislature—to put it simply and accurately—"abolished ... the traditional insanity defense," *State v Korell*, 690 P.2d 992, 996 (Mont. 1984). Under current Montana law, the relevancy of proof of mental disease or defect is restricted to its possible use to negate the so-called "mental element" of

the crime. Section 46-14-102 MCA. In other words, in Montana, a putatively or even certifiably insane defendant may only show, in defense of a criminal charge, that his mental illness affected him to the extent that he was unable to act deliberately, that is, perform various acts purposely or knowingly. Under Montana statutory law as it exists after 1979, a defendant might show conclusively that he met the M'Naghten test, the ALI test, or even the much more restrictive Alaska test for insanity excluding criminal responsibility, and still be found guilty of a felony. In other words, a defendant may be able to prove (in the words of the Alaska insanity statute) that his criminal conduct resulted from a mental disease which rendered him "unable to appreciate the nature and quality of that conduct," and yet not be entitled—in Montana—to a verdict or judgment of acquittal by reason of insanity. Such a result is patently offensive to our traditional concepts of criminal responsibility, and contravenes the due process clause in that respect.

In *State v Korell*, 690 P.2D at 1000, *supra*, the Montana Supreme Court recognized the precise problem presented by this case, but unfortunately proceeded to ignore it in upholding the legislatures' abolition of the insanity defense against constitutional challenge. The defendant in the *Korell* case was not delusional, but was diagnosed as being seriously emotionally disturbed. The Supreme Court, however, considered the possibility that a delusional or schizophrenic defendant might also commit criminal acts. Addressing the problem of this hypothetical delusional defendant, the Court "note[d] that planning, deliberation, and even a studied intent are often found in cases where the defendant lacks the capacity to understand the wrongfulness of his acts." In other words, an insane defendant may well, in the narrowest, most piecemeal sense, be able to act "purposely or knowingly"—that is, with some design or awareness—in the details of his conduct, and yet be utterly unable to comprehend the nature and quality of

his acts. Such a defendant may, thus, be found guilty under current Montana statutory law, even though demonstrably not acting as a free moral agent. Such a result is unconstitutional because it contravenes the

> "fundamental legal principal common to the jurisprudence of this country and to the common law of England that criminal sanctions are imposed only on persons who act with wrongful intent in the commission of an ... offense. (See *Morissette v United States, supra*, 342 U.S. 246, 250-251, 72 S.Ct. 240, 243244.) Since 1850, the disjunctive M'Naghten test of insanity has been accepted as the rule by which the minimum cognitive function which constitutes wrongful intent will be measured. As such it is itself among the fundamental principles of our criminal law."

People v Skinner, 704 P.2d 752, 758-59 (Cal. 1985)

In *Korell, supra*, the Montana Supreme Court found the new Montana statutory scheme relating to criminal insanity constitutional. In doing so, it acknowledged that no decision of the United States Supreme Court supported its decision, and in fact it cited no on-point authority whatsoever for its conclusion. *Korell, supra*, 690 P.2d at 999, 1002. Interestingly, approximately a year later no less an authority on constitutional law than the California Supreme Court reached a quite different conclusion. Considering the question whether the due process clause guarantees the availability of an insanity defense, the California Court reasoned:

> "Because mens rea or wrongful intent is a fundamental aspect of criminal law, the

suggestion that a defendant whose mental illness results in inability to appreciate that his act is wrongful could be punished by death or imprisonment raises serious questions of constitutional dimension under both the due process and cruel and unusual punishment provisions of the Constitution. In *Leland v Oregon* (1952) 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302, the court upheld an Oregon law placing the burden of proving insanity beyond a reasonable doubt on the defendant and affirmed the right of the state to formulate the applicable test of legal insanity. In so doing, however, the court measured the law under due process standards, concluding that the irresistible impulse extension of the traditional insanity test was not "'implicit in the concept of ordered liberty.'" (343 U.S. at p. 801, 72 S.Ct. at 1009). The court thus seemingly accepted the proposition that the insanity defense, in some formulation, is required by due process. (See also *Robinson v California* (1962) 370 U.S. 660, 666, 82 S.Ct. 1417, 1420, 8 L.Ed.2d 758, suggesting that punishment for the status of being mentally ill would constitute cruel and unusual punishment.) Scholars, too, suggest that abolition of the traditional insanity defense may be constitutionally impermissible if the result would be imposition of punishment on a mentally ill person for acts done without criminal intent. (See Robitsher & Haynes, In Defense of the Insanity Defense (1982) 31 Emory L.J. 9; Note, The Proposed Federal Insanity Defense: Should the Quality of Mercy Suffer for the Sake of Safety (1984), 22 Am.

Crim.L.Rev. 49.)

> This court suggested a similar view in *People v Coleman* (1942) 20 Cal.2d 399, 407, 126 P.2d 349, where we observed: "Obviously an insane person accused of crime would be inhumanely dealt with if his insanity were considered merely to reduce the degree of his crime or the punishment therefor."

—*Skinner, supra*, 704 P.2d at 575-58 (emphasis in original)

It is for this latter reason that the Montana statutory scheme—which, of course, does codify the ALI insanity test in the sentencing statutes—cannot survive due process scrutiny. The due process clause requires that criminal liability attach only to acts of free human beings capable of moral reasoning, and who entertain perceptions at least congruent enough with reality to support the most minimal common-sense notion of moral responsibility.

III. LEGAL STANDARDS GOVERNING THE VERDICT HERE.

Because the insanity defense may not be abolished without violating the federal due process clause, this Court will need—in the absence of any valid state statutes on the subject—to apply one of the traditional formulations to determine whether this Defendant's mental disease entitles him to be acquitted of the crime charged. The Court would surely be safe in using the M'Naghten Rule, since it is the test that has been applied for 150 years in most jurisdictions. It would also be safe in using the ALI formulation, since it in fact constituted the insanity defense in Montana for many years [See, Section 46-14-101 MCA: first subsection deleted by Ch.

713, L. 1979].

It should be remembered that the interpretation and application of either the M'Naghten or the ALI standards to defendants suffering from "schizophrenic disorders"[1] is identical. Under each rule, if

> "the mental illness is manifested in delusions which render the individual incapable either of knowing the nature and character of his act, or of understanding that it is wrong, he is legally insane."
>
> —*Skinner, supra*, 704 P.2d at 763.

IV. PROPER USE OF SECTION 46-14-103 MCA.

In considering all this, it is necessary to bear one further distinction in mind, that is,

> "whatever insanity defense exists, it is different from and in addition to the use of psychiatric rebuttal evidence to show diminished capacity to negate the prosecution's proof that the defendant had the necessary mens rea to commit a particular offense."
>
> —*Hart, supra*, 702 P.2d at 655

In other words—irrespective of the question whether a defendant is entitled to be acquitted on account of mental disease excluding responsibility, under the M'Naghten Rule or some similar formulation—a

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[1] American Psychiatric Assn, Diagnostic and Statistical Manual of Mental Disorders, (3rd ed. 1980), pages 181-193.

defendant is, and has always been, entitled to show that, because of the disordered mental condition caused by his illness, he was unable to engage in purposive conduct at the time of the crime. This right of the defendant to offer proof of his incapacity to engage in rational or deliberate conduct, in order to raise a reasonable doubt as to the existence of one of the essential elements of the crime, is recognized in Section 46-14-103 MCA.[2] If the defendant's disease is so severe that basic cognitive operations such as the entertaining of purposes, are impaired, or fundamental reasoning concepts like probability are absent, then the state will fail in its basic prima facie proof that the insane defendant committed a criminal offense.

The relation of this legal principle to the facts of the instant charge is clear. Defendant Cowan is charged with attempted deliberate homicide. Deliberate homicide is defined by Section 45-5-102 MCA as "purposely or knowingly causing the death of another human being." Since the homicide statute defines the offense solely with reference to a result ("the death of another human being"), "knowingly"—with reference to this crime—means "being aware that it is highly probable that the death of another human being will be caused by his conduct." Section 45-2101 (33) MCA. Similarly, "purposely"—in reference to deliberate homicide—means: "having the conscious object to cause the death of another human being." Section 45-2101(58) MCA. "Attempt" is defined as "doing any act toward the commission of an offense with the purpose to commit that specific offense." Section 45-4-103(1) MCA. Putting all

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[2] To the extent it recognizes this right, Section 4614-103 MCA is, of course, not only constitutional, but required by the Constitution. Its unconstitutionality arises from the circumstance that, under the statutory scheme enacted by House Bill 877, it purports to restrict the relevancy of evidence of mental disease to this aspect of the case only.

these definitions together defines the exact contours of the State's burden of proof in this case. It must prove that Joe Cowan, at the relevant date and place, committed acts toward causing the death of another human being, and that when he committed those acts, he: (1) entertained the conscious object to cause the death of another human being; and[3] (2) was aware that it was highly probable that the death of another human being would be caused by his conduct. Consequently, any evidence tending to negate the existence of the relevant purpose or knowledge in Joe Cowan's mind at the time of the conduct complained of would be probative of reasonable doubt of guilt. Examples of such evidence would be psychiatric opinions finding the defendant's mentality so disordered that it would be doubtful if he entertained clear and well-formed purposes, or if those purposes related to reality; or, similarly, doubtful whether the concept of probability, in the normal sense, entered into his mental processes at all. Specifically, evidence that Joe Cowan sincerely believed the victim to be a robot would go not only to establish a conventional insanity defense, but would tend to negate the proposition that he intended to cause the death of a human being.

RESPECTFULLY submitted this 20th day of December, 1990.

MARGARET L. BORG
Public Defender's Office
317 Woody Street
Missoula, MT 59802
(406) 721-5700

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[3] Not or. The attempt statute in effect superimposes a specific intent requirement upon the general mens rea requirement of the deliberate homicide statute.

APPENDIX F

PUBLIC DEFENDER OFFICE
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317 Woody Street
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Telephone: (406) 721-5700
Attorneys for Defendant

MONTANA FOURTH JUDICIAL DISTRICT COURT,
MISSOULA COUNTY

STATE OF MONTANA, Plaintiff, —vs— JOE JUNIOR COWAN, Defendant.	Cause No. 9238 BRIEF IN SUPPORT OF MOTION TO SET ASIDE VERDICT

I. REFERENCE TO DEFENSE MEMORANDUM OF LAW OF 12/20/90

The Memorandum of Law submitted by the defense at the close of the evidence on December 20, 1990 sets forth the basic legal contentions of the defense here; and cites the case authority in support of those contentions. It is therefore incorporated by reference in this brief; and this brief is intended to be read in conjunction with the December 20, 1990 Memorandum in all respects.

II. THE IMPOSITION OF CRIMINAL LIABILITY AND PUNISHMENT ON AN INSANE PERSON FOR ACTS RESULTING FROM HIS INSANITY IS FORBIDDEN BY THE DUE PROCESS CLAUSE OF THE U.S. CONSTITUTION

It is an ancient and fundamental principle of the criminal law that criminal liability is imposed only on persons acting as free moral agents. It seems reasonably clear that the federal due process clause imports this principle into State criminal jurisprudence in two ways:

(1) by way of the Eighth Amendment's prohibition against cruel and unusual punishment, made applicable to the States by the Fourteenth Amendment.

(2) by way of the "ordered liberty" concept of the due process clause itself (which limits State innovations in criminal jurisprudence to those which do not dispense with fundamental concepts of fair criminal procedure, such as the reasonable doubt standard).

In this case, the evidence presented at trial established without any question that:

(1) Joe Cowan was clinically insane, suffering from a schizophrenic disorder marked by delusional states.

(2) Joe Cowan's charged conduct resulted from and was a manifestation of his insanity.

This evidence entitles Joe Cowan to be found not guilty by reason of insanity, and treated accordingly. In the federal system and in the other 49 states of the union, this result would follow without any question on this evidence. In Montana, it does not follow without the court first determining that the purported abolition of the insanity defense in this State is unconstitutional. That determination is relatively easy to make, however, in that Montana clearly has no power to "abolish" or otherwise alter basic traditional features of criminal law. It cannot properly "abolish" the insanity defense, any more than it can abolish the reasonable doubt standard,

or the requirement of an unanimous verdict in criminal jury trials.

III. THE VERDICT IN THIS CASE IS BASED ON IRRELEVANT EVIDENCE ABOUT PURPOSE

In order to find Joe Cowan guilty under the (invalid) Montana statutory scheme, this court was required to find that he acted "deliberately" in his assault. It found this based on evidence of a certain rationality or design informing the details of portions of his conduct; for example, the fact he was apparently able to understand that in order to get inside, he had to break the lock on a locked door; the fact he was able to tell the difference between a person and a chair. The trouble with this kind of evidence, obviously, is that it has nothing to do with discriminating the sane from the insane. Insane persons, almost without exception, have some minimal contact with reality; few insane people are literally unable to "get about"—which would be the result if they could do nothing purposefully. To qualify as criminally insane under the Montana statutory scheme, an individual would apparently have to be the stereotypical immobile "drooling idiot"— quite literally incapable of crawling across the room to get to the other side.[1] He would have to be capable of far less rational conduct than we expect from a domesticated dog or a wild bear. As has often been pointed out in the cases, the "minimum level of cognitive function" traditionally used to assess the moral culpability of the insane is far higher than this. At the very least, it has been required that the insane defendant appreciate the "nature and quality of his acts"—that is, the manner in which they fit into the normal context of human reality, and their moral character as human acts. In this case, the court has convicted a delusional defendant whom the evidence has demonstrated has no relevant understanding of the nature and quality of his acts. A schizophrenic individual acting in the throes of insane delusion has, until

now, been regarded as the prototypical candidate to be adjudged not guilty by reason of insanity. This court is respectfully requested to reconsider whether it is justified in the radical departure from tradition embodied in its verdict here.

SUBMITTED this 30th day of January, 1991.

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[1] Interestingly, we can see from this analysis that what the Montana legislature has actually done is not "abolish" the insanity defense, but restrict it to one narrow form of insanity: catatonia.

APPENDIX G

Noel L. Hoell. M.D.
Psychiatry
BROADWAY BUILDING
554 WEST BROADWAY
MISSOULA, Montana

June 25, 1990

Dr. Robert Shea
554 West Broadway
Missoula, MT 59802

RE: JOE COWAN, JR.
DOB: 2/28/59

PSYCHIATRIC CONSULTATION REPORT (6/21/90)

Dear Dr. Shea:

At your request I performed a diagnostic assessment on Mr. Joe Cowan, currently housed in the Missoula County Jail on charges of attempted homicide and burglary. Prior to my seeing Mr. Cowan, I reviewed the records available, mainly from the state of North Carolina. I interviewed Mr. Cowan in my office for over an hour and a half, emphasizing recent activities, and mental status examination.

Patients' background, briefly, is that of a black man raised in a poor Southern family, one brother diagnosed as schizophrenia, mother having emotional problems of an unspecified nature, and a poor relationship with his mother, he tried to assault her on at least one occasion. He was not however, diagnosed as having mental problems until approximately three years ago. He served in the Navy, got an honorable discharge, has some college education, is a man of normal intelligence.

In the last two or three years however, he has been hospitalized in private and VA facilities in the state of North Carolina, seen through a county mental health center, diagnosed as suffering from undifferentiated schizophrenia, major depression with psychotic features, and has perhaps received other diagnoses. He has been treated intermittently with Thorazine, up to 600 mg/d. He has been reported as having such psychotic symptoms as persecutory delusions and auditory hallucinations, which have been helped with neuroleptic medications in the past.

Recent history provided includes the following. Patient initially stated that he felt his life was not going very well in North Carolina and wanted to travel out to the Northwest to visit friends, perhaps do a little fishing, maybe go to Canada, perhaps find some work. He states he left Carolina in early April. His 79' Chrysler LeBaron developed troubles on the way, found it difficult to drive in snow and inclement weather, which he was not use to. He was out of gas and money, the car broke down, he sold the car near Salmon, Idaho, and apparently hitchhiked up highway 93. His description was vague, but there appears to have been confusion in his mind to where he was, and whether he was in Idaho or Montana. The day prior to the alleged offense he was apparently stopped by highway patrol who inquired if he was having difficulty, but he was not picked up. On the day in question he was tired, hungry, had just been eating "junk food", it was raining, getting dark, he saw a house with a light on. He emphasizes that he knocked on the door, shouted, sat outside on a bench for awhile, in full view of the highway. At the time he stated that he had a headache, his feet hurt, he was tired and hungry. After a time he entered the house, ate out of their refrigerator, and apparently had a couple cans of beer. He came to feel that the place looked familiar to him, like a house he use to own in Idaho. This part of the story is rather confused, he indicates that the house near Idaho Falls had been

willed to him and his brother by a friend of his father, that perhaps he had visited the house as a youngster. He thought it had been destroyed by fire. He thought that perhaps he was in Idaho, and because of the appearance of the house and the relationship of the out buildings wondered whether it could be his house. He walked around the house, examining pictures on the walls, sat in the livingroom "and waited for the owner to come in". He tried to use the phone to call a friend in Florida to wire some money up, but could not get through. "The operator was acting funny" He apparently walked in and out of the house a couple times, examining the grounds, and while still wondering if it could be his old Idaho house a woman drove up in an old Honda Civic and quickly walked into the house. Apparently outside when she arrived, he knocked on the window, he felt that she initially ignored him, and then told him to go away. "It said to go away, it was so mechanical". He added "I know they make robots, I've seen them". Then talked about how religious groups "inscribed people certain ways". He emphasized the height of the woman "it must have been at least 6'5" tall, and did not believe that she was a real person but "a controlled thing made to look like a 6'5" white woman". He also thought it was strange that he had not seen her picture hanging in the house. He wanted to go back into the house to retrieve his backpack, but she was yelling "Who is it? Get out, who are you!" etc... By this time he was increasingly sure that it was his house. He seemed to feel that his behavior was justified, and that the womans' behavior confirmed to him that "she was a thing". He noted her trying to use the phone. Continually referred to her as "it" during this discussion. He picked up a "hoe thing" and pounded on the door with it, waited and waited. He felt at the time that "people were watching" this whole episode unfold, but could not explain why. He states that he looked for microphones, cameras, things outside that would "control the thing that lived in the house". He states he broke the door in with the "hoe thing", saw that he had a shot

gun and was screaming at him. At this point he "hit his limit" with her behavior, struck her with the hoe tool, took the gun from her and apparently struck her with that a number of times. He described how it felt like she was made of metal or plastic when he hit her "like they make new cars". He felt because of her size that if she had hit him she would of done him great harm. He decided to "kill this god damn thing". Prior to getting back into the house he had slashed the tires on her car because he was angry at her behavior. He denied any remorse for his behavior because he came to feel increasingly that it was "his house", and that she was a "mechanical thing". He added "I just hope they don't put her back together". He "knew" that he was constantly watched during this time because minor objects keep moving around from one place to another in the house (a wallet, box of bullets, etc.). During this time police arrived and he surrendered.

Mr. Cowan indicated that he was hearing voices during his trip. "Sometimes they sounded like the wind", at other times they said things more identifiable such as "where are you going, don't turn on the radio, you'll never make it, etc.). He denied any drug use on the trip. He indicated intermittently taking some Thorazine, although I could not determine how much, except that its use seemed quite sporadic. He indicated having an occasional beer on the trip, perhaps eight total, including the two that he consumed in the house. On the trip he often felt that people were "thinking at me" and referred to "telepathy". He denied however that the radio or television talked to him. He denied the ability to read minds himself ("on Thorazine too long for that"). He implied that others could read his mind.

Patient was noted to be a slightly built black man who was alert, oriented, generally cooperative, who initially related in a glum and somewhat quiet manner. Eye contact was only fair. He tended to ramble, repeat

himself, was quite circumstantial and digressive. He seemed rather unresponsive to verbal and other ques, would continue talking often when I asked things. He laughed inappropriately at times and could not explain why. Affect was inappropriate, rather chilling in fact when discussing lack of any feelings of remorse or regret for almost killing a woman. (This could be considered consistent however with his belief that she was a mechanical "thing"). He tended to get more emphatic and demonstrative as he explained the events at the house. He did not appear to be hallucinating in my presence. He indicated that he had been stopped in North Carolina for speeding shortly before leaving on his trip, vaguely implying that he was being harassed. When allowed to ramble, a rather extensive delusional system became apparent. He talked about working for the government "to keep the barbarians down". Certain religious groups "inscribe" people by giving them "dirty LSD", which he referred to as Dilandria. These religious groups impressed secret languages, codes, and "proudness" on people. Talked about the We-uns, apparently referring to Southern Baptists, hypnotizing, programming and mesmerizing people "to break us up into certain groups". When pressed as to what branch of government that he had worked for, what he had done, etc., he became extremely vague and evasive. He tended to be tangential, and showed numerous loose associations. Some of his references were unusual and vague as to be almost unintelligible, such as religious groups growing eggs in artificial wombs for unspecified reasons. He indicated that he had never married because he didn't have the time. Responses were somewhat more appropriate when questions were tightly structured, such as inquiry about how things were going in the jail. He indicated however that the jailers would not tell him the date when he asked, that other prisoners beat him on one occasion and showed me some marks on his nose to prove this. "The federal government put these geeks in there" for some unspecified sinister reason, and also speculated

vaguely as to whether religious groups put people in the jails to torment and beat him.

DIAGNOSTIC IMPRESSION: Schizophrenia, probably paranoid-type. Consistent with this diagnosis are age of onset, auditory hallucinations, persecutory delusions, thought broadcasting, inappropriate affect, and some breakdown of thought process. It would appear, based on history provided, that the patient was psychotic at the time of the alleged assault. It may well be that the stresses of the trip exacerbated his condition at that time.

Sincerely,

Noel L. Hoell, M.D.

NLH/ra

APPENDIX H

William D. Stratford, M.D.
Community Physician Center #2
2831 Fort Missoula Road, Suite 305
Missoula, Montana 59801
Telephone (406) 728-4100 x 5441

August 15, 1990

Honorable Judge Ed McLean
District Court Judge
Fourth Judicial District
Missoula County Courthouse
Missoula, Montana 59802

Dear Judge McClain:

Pursuant to your order in Cause No. 9238, I have had the opportunity to psychiatrically evaluate a man by the name of Joe Junior Cowan.

Mr. Cowan is a 31 year old, single, Black male; DOB: 2/28/59. Mr. Cowan is charged with Aggravated Burglary and Attempted Deliberate Homicide in connection with incidents occurring on or about April 24, 1990, at the Lolo Work Center out of Lolo, Montana.

My examination consisted of:

1. An independent clinical interview
2. Psychological testing to include:
    A. Weschler Adult Intelligence Scale—Revised
    B. Rorschach
    C. Thematic Apperception Test (TAT)
    D. Minnesota Multiphasic Personality Inventory (MMPI)
    E. Millon Clinical Multiaxial Inventory (MCMI)

3. A review of incident reports and police reports.

4. A review of a psychiatric evaluation done on Mr. Cowan several years ago.

5. Interviews with multiple jail personnel with regards to Mr. Cowan's behavior and demeanor since his arrest.

6. An interview with Susan Hintz, Missoula County Sheriff's Deputy.

7. An interview with Bill Smith, Missoula County Sheriff's Deputy.

8. An interview with Ed Gemison, a detective with the Missoula County Sheriff's Department.

9. An interview with Larry Weatherman, a detective with the Missoula County Sheriff s Department.

10. In a phone interview with Maggie Doherty, the victim.

11. An interview with the defendant's mother in North Carolina.

12. An interview with the mother of a woman who had been previously attacked by Mr. Cowan in approximately 1987.

13. A review of records by Dr. Herman Walters from the University of Montana.

Mr. Cowan was interviewed repeatedly by myself at the Missoula County Jail and was administered many clinical tests. Additionally, a Standard Psychiatric Mental Status Examination was done.

Mr. Cowan apparently has never been married. He has graduated from high school and apparently has two or three years of attendance at North Carolina A&T University; majoring predominately in Mechanical Engineering. He did apparently well, by his record, in English Literature, but had difficulty with higher mathematics and slowly withdrew from the University in approximately 1981.

Mr. Cowan is not a good historian and the dates

varied from interview to interview. They were substantially corroborated by his mother, but the timing would have to be looked at with a jaundiced eye.

Mr. Cowan was in the United States Navy from 1976 until 1980. This was approximately a four-year term. He was discharged as an E-4, with an Honorable Discharge. Mr. Cowan described going into the Great Lakes Naval Station; he was stationed at Groton, Connecticut, in machine repair, and then sent to Charleston, South Carolina. He was on the USS-Vallejo submarine for three years as a Machinist Mate. He then returned to Charleston for land duty at the end of his tour, and helped some of the early recruits. Mr. Cowan stated he received some good efficiency ratings and was not disciplined in any way. There was nothing negative on his service record according to him and he denied any conflict on the submarine. Mr. Cowan did at one point say he had seen a Navy doctor for anxiety, but was not treated with medication. He does not apparently receive any service-connected disabilities.

Mr. Cowan's history after the Navy varies somewhat. He indicated he had worked at Trasco, Southern Copy and Reproduction, and Technical Reproduction and Supply; three different companies in North Carolina, all full-time jobs, for one to one-half years each. Then he stated he attended North Carolina A&T University. Mr. Cowan lived on campus part of the time. After he dropped out of North Carolina A&T University, he became as he says, clinically despondent and did odd jobs. Mr. Cowan stated he has had no fulltime jobs since attending North Carolina A&T, and has only worked part-time. Mr. Cowan described approximately 30 different jobs he had held since college, including a Dow Corning assembly, delivery, warehouse, etc. In another interview, Mr. Cowan indicated he had worked for Desoto Chemical for about four years.

Mr. Cowan's family history consisted of the following: his paternal grandparents apparently died of old age, his maternal grandparents died in a car accident apparently caused by his father. Mr. Cowan's father does lawn work in North Carolina. His mother is a maid and cleans houses. I mentioned earlier that I spoke to Mr. Cowan's mother; she described his need for medication and stated he had been seeing a doctor back in North Carolina for mental problems. She concurred in stating the mental problems did not begin until he was in college. While Mr. Cowan told Dr. Walters he had two siblings, he told me he had four, including a younger sister. Apparently, there is a younger brother, Jerome, who has taken some kind of medication and may have a similar ailment.

Mr. Cowan did not indicate that alcohol abuse has ever been a problem. He stated he did drink heavily in the Navy, but as we pursued that, it appeared that was about a 6-pack a week. Mr. Cowan also indicated he had used some marijuana, of poor quality and not daily, during that same year. He denied categorically using any other hallucinogens, sleeping pills, tranquilizers, etc.

Mr. Cowan indicated his juvenile criminal record was fairly clear, with the exception of a lot of traffic tickets, some of those being for speeding. As an adult, I felt Mr. Cowan was distant and evasive. He did not give me any idea that he was giving me a clear and accurate picture. Mr. Cowan stated there was one time when he got 12 tickets totalling about $1200, when he had returned on a motorcycle from Georgia and was arrested. Another time Mr. Cowan told me he had been in a lot of county jails, but would not tell me when and where. His mother indicated he had been in trouble in Orlando, Florida, but she did not know any specifics. It appears Mr. Cowan received some Breaking and Entering, and Assault charges about 1987. He said he spent

60 or 70 days in jail, and then was sent to a hospital. He stated he was there a short time (approximately 2 days?) and then was allowed out. I am unclear really as to the number of times Mr. Cowan has been in and out of jails, or to the number of previous charges against him.

Mr. Cowan states he is in good physical health. He denied any ongoing physical problems. He stated his psychiatric history included having been in two state hospitals; one in 1987 voluntarily, when he said he was there for two months and was treated with Thorazine and Prolixin. Second, he was hospitalized in November of 1989, against his will, for about 10 days and was again treated with Thorazine. He described having been seen by a doctor in North Carolina, whom I have not been able to reach. This doctor talked to him about the risks of Thorazine. He was suppose to take 400 milligrams a day. Mr. Cowan said he took it faithfully until he was arrested. (This may be a falsehood.) He stated the Thorazine makes him forget and sleepy. It also appears to diminish the auditory hallucinations, but he said, it makes him despondent. As I talked to his mother, I got the idea from her that he had been in more state hospitals. Mr. Cowan, on the last interview, said he had been hospitalized at the Duke University Medical Center on one occasion. All of these occurred in the last three or four years.

As far as income, Mr. Cowan apparently receives a Social Security Disability check in the amount of $560 a month. He has received this for the last two years. Mr. Cowan stated he has had two evaluations in Durham, North Carolina, and the disability is what he takes the Thorazine for. I asked him what if the doctors wouldn't agree, and he was very quick to point out there was a very thick folder with previous reports which would certainly impress any examiner that he was ill.

During my clinical time with Mr. Cowan, he was polite and distant. Sometimes he would stop and have

trouble focusing on my questions and seemed to be attending to internal hallucinatory stimuli. His affect was occasionally inappropriate, but he was certainly distant and somewhat disconnected. In the first two interviews, Mr. Cowan was lucid, bright, possessed a wide-ranging vocabulary, and was certainly intact. In the third interview, accidentally, as we began talking about his motorcycle and the tickets he received, he began to be embroiled in a huge delusional system about Indians in North Carolina who clone themselves, and abuse and torture residents. He said there are holes in these Indians. Other Indians put a little later and Dilaudid into the hole and clone them; their main function being to pester, control and intimidate people. Mr. Cowan stated the only way to get them, is to cut a hole in them . Their parents will come for them, because the pain hurts like hell . He said that is the way you can kill them, otherwise they are cloning and laying eggs over the countryside . On this one occasion, Mr. Cowan disintegrated into a rambling, delusional system, indicating he was arrested by a 7'2" robot, who was metal on the inside, with rubber armor, and was one of the Weypro clones. During the same rambling dialogue, Mr. Cowan indicated he had been followed by a helicopter from North Carolina, and the incident at Lolo Creek was him hitting a machine and reddish stuff came out of its head. He stated originally, when he was in this state, the door was open, he knocked and yelled, but there was a helicopter following him. He knocked on both front and back, and when interrupted, even in his delusional system, he said if someone were there he would have gotten water, and left, and would not have stayed. He indicated, on this occasion, however, that the helicopter had been following him for weeks and that he had been in Missoula several times. Mr. Cowan told me about knocking on the door, and he said there was the machine inside, it was yelling and it looked like a woman, but to each his own. That interview was terminated as he became more confused and volatile.

That night or the next day, it appeared he had set a fire in his cell, which required some intervention on the part of the personnel there.

The subsequent two interviews, however, found him lucid, nondelusional and cooperative. In his description of August 14 he described how he got from Billings to Butte, Montana, looked for a pawn shop, got rid of some material to get gas money, and was angry he only got $40 for a VCR there. Mr. Cowan stated he went to Missoula and then drove down to Idaho Falls where he stated he sold his car. He then hitchhiked back up to Missoula, because it; was the closest town. He had been going north and south, so he decided it was time to go west, as he was ultimately trying to go to California. Mr. Cowan stated he walked for miles and slept on the side of the road during heavy rain. He was stopped by a policeman, who told him it was going to rain, and who offered him a ride to Missoula. Mr. Cowan indicated he refused the ride. It. continued to rain, he was soaked and had nothing to eat. It was dark he said when he got to the house. He said he knocked on the door, and if there was someone there, he would have just gotten water or directions. He went around to the side of the house and yelled again, indicating to me, that he was looking for someone in there so he could get directions or some food, but was aware it was not his property. He said he was exhausted, so he sat outside and ate a loaf of bread and started to sleep. He then knocked on the side door, which was in fact two doors (storm door?), knocked on both, found they were open and went in. He saw a phone and said he tried to call information to find out where he was, but he couldn't figure out how to use the phone. He said he got a couple of beers out of the fridge. He turned on the lights, ate some candy and watched TV and waited. He did not take a shower because he thought the person could come back at any time and he wanted to talk to them and find out where he was and get some information. He said he had gone to sleep, and had eaten

some old sausage and maybe had made some eggs. He turned on the television as he wanted to know where the TV station was originating from. He saw some other buildings behind the main building and went over there, as the original building he was in was obviously occupied. He said the other buildings were not as clean, but one had a phone as well and he tried to call again for information without any effect. He thought he would be better off to be in these outer buildings because they weren't lived in. He said someone pulled up in a Honda Civic, which was about 20 years old. He said he went outside and tried to communicate. He indicated it looked like a woman. He said he told her he had a knapsack in there (the house). He then indicated he went back to the other house and allegedly yelled at her that he was just passing through and wanted to pick up his junky clothes and food in his backpack and just keep moving. He said he thought of going up the hill into the mountains, because she was on the phone and he thought there would be policeman on the highway coming after him. This certainly would indicate some appreciation of possible criminality. This was later supported by him saying he knew he had trespassed or had been breaking and entering. He indicated in his mind, looking back, he said he wanted to get his bags from the house so that he could get something to eat or get some matches to make a fire and leave. He then indicated this "lady-thing had a shotgun", which again is a questionable reference as to whether or not he thought this was a human or a mechanical object. He indicated she was screaming and he was becoming more angry, and if she was saying she was calling the police, his thoughts were that he was going to go to jail anyway. He described her as very big as she seemed 7' tall. He grabbed the gun, because of his clear awareness that a gun could hurt him. He threw the gun away, struggled with her, and hit. her with a hoe with a "couple of lucky shots" and went outside. He said he was accosted by a female officer. He ran around the building and there was another man there. He was told

to hold it or stop. He told me that he said to them, "let me get my bag" and he ran around the building and got it. He told me he did that because he had his glasses in it. Throughout this history, he indicated he was real clear it wasn't his food, it wasn't his residence and that he was just trying to find directions.

I administered the Competency Assessment Inventory, which is the McGarry Competency Assessment Instrument. This covered a variety of levels of functioning. Mr. Cowan has a wide-ranging appreciation of the nature of the charges, and an intact ability to appraise a variety of outcomes. He was aware of the factual nature of the charges against him, and on four out of five occasions, had a rational sense of understanding of the charges against him. The one exception, was the time when he became overtly delusional. Mr. Cowan indicated he would enter a plea of innocent, because he had tried to "notify everybody and had called into the house". He was able, for example, to describe the function of a jury as: "On a major crime they decide guilt or innocence, there were twelve; a plea-bargain was when lawyers make a deal with the judge for a lighter sentence in exchange for guilty."

Mr. Cowan, I think very importantly, indicated he has gone over some details of his case with Margaret Borg. He said he trusted her, but he wasn't sure if she was a robot or not. He said he didn't check because she was the only lawyer he had. He stated they have had some long sessions. There seemed to be no black in my judgement to their relationship. In my professional opinion, Mr. Cowan was able to answer the relevant questions in the Competency Assessment Inventory in a way that would clearly suggest he is competent to stand trial. My opinion is based on the repetitive interviews which would indicate that outside of his delusional system he can communicate effectively and easily. On some occasions, he can even talk about the delusional

system without becoming rabidly psychotic. I believe also he could help Ms. Borg confront needed issues and details in the courtroom.

I think diagnostically, Mr. Cowan is Schizophrenic, which is a major mental disease, and he has probably been so for at least the last three or four years. In my professional opinion, Mr. Cowan is capable of understanding the proceedings against him and assisting in his own defense. I am aware Mr. Walters has some serious concerns about competency. He has suggested in our conversations, a time at the State Hospital, with the reinstitution of Thorazine or other psychotropic medications. This would be clearly appropriate. I believe he is competent off of Thorazine for anywhere from four to nine months. He would certainly be more competent, if there is a serious question with a 30-day incarceration at the State Hospital, with mandatory Prolixin or Haldol. However, I believe Mr. Cowan is competent at this point. I believe, also, Mr. Cowan had the capacity to have the state of mind at the time of the offense charged, namely the capacity to act knowingly or purposely.

It is, however, my professional opinion that a person can certainly act knowingly or purposely, and still be functioning in an psychotic or delusional world. This was a by product of our infamous 1979 change in Montana law. It is much more likely than not, that Mr. Cowan was functioning in his delusional system at the time of the criminal conduct charge. This is primarily supported by Maggie Doherty, who said he referred to her as a mechanical bitch or a robot bitch.

Certainly now, four months later, there are clear indications that Mr. Cowan could appreciate the criminality of his conduct. Even when Mr. Cowan was overtly psychotic, he was indicating to me he was clearly aware of trying to find out who was there, who lived there, and finding a way to just take care of some basic needs, and

move on. I think Mr. Cowan's ability to appreciate the criminality and to conform his conduct, at the time of the criminal conduct charge, was certainly limited but not absent as a result of his mental disease.

Overall, Mr. Cowan struck me as a psychotic, yet likable, young man, periodically attending to voices, which are both male and female and are often frightening to him. He is bright, fairly articulate, and has a wide fund of knowledge and background. I do not think innately that he is inherently malignant or a pathological individual. In fact, Mr. Cowan appeared to have a reasonable work ethic, some sense of community, some history of positive adaptation in the military, and it appears he has, in the last few years, deteriorated with the illness called Schizophrenia.

I appreciated the opportunity of examining Mr. Cowan for the court. I look forward to any questions which you, or the other attorneys might have for me.

Respectfully,

William D. Stratford, M.D.

WDS/bm:sm
cc: County Attorney Bob Anderson

APPENDIX I

Department of Institutions
Montana State Hospital
Warm Springs, Montana 59756-0300

November 26, 1990

The Honorable Ed McLean
District Judge, Fourth Judicial District
Missoula County Courthouse
Missoula, Montana 59801

RE: COWAN, Joe Junior
Montana State Hospital Number: 5-53691
Court Cause Number: 9238/41

Dear Judge McLean:

Joe Cowan is a thirty-one year old black male on his first admission to Montana State Hospital. He was admitted on 9/12/90 from the Missoula County jail. Mr. Cowan has been charged with felony aggravated burglary and felony attempted deliberate homicide. It is alleged that, on or about April 24, 1990 Mr. Cowan broke into a woman's residence at the U.S. Forest Service's Lolo Creek Work Center. It is further alleged that he assaulted the woman using a garden tool, causing life threatening bodily injuries. After his arrest, Mr. Cowan underwent several mental evaluations and was subsequently adjudicated unfit to proceed in facing the criminal charges. Legal proceedings were suspended and he was committed to Montana State Hospital to receive treatment for a period of 90 days. This report is being submitted to provide current information on Mr. Cowan's mental status to assist the court in reviewing his case at the end of the 90 day commitment period.

Available records indicate that, after his arrest,

Mr. Cowan was initially evaluated during June, 1990 by Robert A. Shea, Ph.D. Dr. Shea diagnosed Mr. Cowan was suffering from Paranoid Schizophrenia, Major Depression with Psychotic Features, and Antisocial Personality Disorder. Dr. Shea issued the opinion that Mr. Cowan was competent to understand the proceedings against him and to assist in his own defense.

Noel L. Hoell, M.D. also conducted a psychiatric evaluation during June, 1990. Dr. Hoell noted that there is a history of mental illness in Mr. Cowan's family, with his mother having experienced emotional problems in the past and a brother having been diagnosed schizophrenic. Dr. Hoell also felt that Mr. Cowan suffered from Paranoid Schizophrenia.

Additional evaluation was completed by William D. Stratford, M.D. during August, 1990. That evaluation noted a history of at least two previous psychiatric hospitalizations and past treatment with chemotherapy. During the evaluation Mr. Cowan discussed extensive psychotic delusional belief systems involving Indians who clone themselves and torture other people. He also reported believing he had been followed by a helicopter from North Carolina and that, at the time of the alleged crimes, he believed the alleged victim to be some type of metal robot rather than a human being. The patient's preoccupation with these delusional ideas apparently varied considerably from interview to interview. Ultimately, Dr. Stratford issued the opinion that Mr. Cowan was schizophrenic, but competent to proceed in legal proceedings and able to form the requisite state of mind at the time of the alleged crimes.

Finally, Mr. Cowan was again evaluated by Dr. Shea on September 11, 1990. At the time of that contact Dr. Shea felt that Mr. Cowan's mental condition had deteriorated to the point that he was no longer competent to proceed in facing his legal situation. Dr. Shea

noted that Mr. Cowan's thought processes appeared extremely tangential and that he was highly excitable during the attempt to interview him. Mr. Cowan was subsequently adjudicated unfit to proceed and committed to Montana State Hospital for treatment of his mental illness.

Since his admission to Montana State Hospital, Mr. Cowan has resided on the offender unit of the Forensic Treatment Facility. He has been cooperative with ward routine and has not caused any unusual problems on the ward. He has, however, remained rather seclusive, spending his time reading or simply sitting in his chair. He has not typically initiated interaction with staff or other patients. He has volunteered little or no information about himself or about the circumstances leading to his commitment to the state hospital. He has, however, been cooperative with a program of antipsychotic medication and appears to have derived some benefit from that treatment. When initially admitted he appeared quite preoccupied and occasionally discussed psychotic symptoms such as hearing hallucinatory voices from the radio or television. However, as his condition has begun to improve with medication he has reported he no longer experiences such symptoms.

Psychological Assessment

Interview Data:

Mr. Cowan was generally cooperative with all procedures required for psychological evaluation, although his responses to questioning during the interview portions of the evaluation tended to be vague and somewhat evasive. His rights concerning participation in the evaluation were explained to him and he reported he understood those rights. He also reported understanding he had been charged with felony aggravated

burglary and felony attempted deliberate homicide He reported he understood that the result of the present evaluation would be communicated to the court to assist in the disposition of his criminal case.

Mr. Cowan described himself as suffering psychiatric problems "off and on" since approximately 1987. He described having experienced auditory and visual hallucinations as well as delusional ideas of a persecutory nature. Mr. Cowan was quite vague when asked to specifically describe his psychotic experiences. He appeared rather embarrassed to discuss his symptoms. He did acknowledge having occasionally thought the television or radio was sending messages to him. He also described hearing vague voices commenting on his behavior or instructing him to do certain things, such as travel. He reported that, on one occasion, the hallucinatory voices told him to break a window and cut himself. He has obvious scars on one wrist which he reported resulted from that episode. He denied, however, that the hallucinations ever instructed him to harm any other people.

Mr. Cowan also reported having experienced delusional ideas with predominantly paranoid themes. He said that he has, on many occasions, felt he was being followed by someone or something. He could not identify the specific source of those feelings, but stated he often felt he was being pursued by "hate groups." He did acknowledge that, on several occasions, he has experienced a hallucination involving a helicopter chasing him. He denied experiencing significant affective disturbances including periods of depression, anxiety, or agitated mood. He also denied experiencing temper problems and described himself as a generally nonviolent person. He did, however, acknowledge having struck his mother in the past, but could not explain why he had done so except to state that she was ignoring him.

Mental Status Examination revealed Mr. Cowan to be appropriately groomed and dressed. He appeared mildly preoccupied throughout the interview and avoided eye contact with the examiner. His current reality contact, however, appeared generally intact. He was able to appropriately attend to the interview process and did not appear preoccupied with internal stimuli such as hallucinations or delusions. Motor activity was somewhat subdued and affect was flat. Speech was somewhat sparse and the patient appeared to wish to avoid discussing his psychotic symptoms in detail. Concentration, attention, and memory appeared currently unimpaired. Mr. Cowan was able to demonstrate appropriate abstract reasoning abilities and there were no indications that his logical thought processes were distorted by the presence of current psychotic ideation. He demonstrated some degree of insight into his mental condition, acknowledging that he was mentally ill and acknowledging a need to take psychiatric medications. He consistently tended, however, to minimize the seriousness of his mental illness and the behavioral effects which result from it.

Results of Psychological Testing:

Objective personality testing was accomplished using a Minnesota Multiphasic Personality Inventory (MMPI). The MMPI is a multidimensional personality inventory which assesses a number of factors believed to contribute to the overall personality structure. The instrument also contains validity indices which assess an individual's general approach to the testing.

Validity patterns on Mr. Cowan's MMPI were within normal limits. He appears to have understood the testing adequately and to have completed it in a generally honest fashion. There is no evidence to suggest that he either consciously exaggerated or minimized the reporting of emotional symptomatology. Therefore, the

results of his MMPI assessment are considered to be a valid representation of his current personality structure.

Clinical MMPI scales were consistent with a diagnosis of Paranoid Schizophrenia. Individuals producing this code type tend to be unpredictable, emotionally distant from others, and peculiar in thought and action. Such individuals often establish an attitude of distrust toward other people quite early in life. They learn to view the world as a hostile and rejecting place, reacting with an "on guard" attitude to defend themselves against anticipated rejection. Emotionally, such individuals are labile. They may react to stress with depression, unpredictable aggression, or extreme social withdrawal. Hallucinations and/or delusions may be present when the illness is not controlled with proper treatment. Often, such people become preoccupied with private ideas and fantasies to the exclusion of meeting the responsibilities of the external world. Academic and employment histories are typically unproductive. Often, such individuals lead nomadic existences while avoiding any commitments in terms of vocational choices or social relationships.

In addition to the underlying Paranoid Schizophrenia, Mr. Cowan's MMPI profile was indicative of a signficant level of current depression. The majority of this depression is probably situational in nature and will likely improve once his legal situation is resolved.

Additional personality assessment was undertaken using a projective sentence completion inventory. The projective instrument occasionally elicits evidence of underlying psychopathology in the form of impaired reality contact, odd perceptions, idiosyncratic logic, or personalized interpretations common in individuals experiencing various forms of mental illness. In general, Mr. Cowan's responses to the projective measure did not

contain such evidence although he did make one reference to "conspiracies" against him. His overall performance on the projective measurer however, indicated that the more overt symptoms of his mental illness are currently well controlled with medication.

Assessment of Current Competency:

As noted above Mr. Cowan appears to have responded favorably to his program of chemotherapy and other treatment available at Montana State Hospital. As a result, his understanding of his legal situation has also improved and he appears currently competent to proceed in his facing his criminal charges. Mr. Cowan's competency was formally assessed using a Competency to Stand Trial Assessment Instrument (CAI) developed by A.L. McGarry and Associates at the Harvard Medical School. The CAI is a structured interview technique designed to assess a variety of factors contributing to overall competency. Mr. Cowan's responses to the CAI suggested that he is currently competent to proceed in facing his legal situation. He was able to accurately state and discuss the charges against him. He had a reasonable understanding of what those charges meant and of the likely penalties he faces if convicted. He had a good understanding of the roles of various participants in a trial, as well as general courtroom procedures. He had some awareness of how his mental state might influence the possible outcome of a trial. He had a reasonable understanding of how an attorney might assist him in formulating a legal defense and in defending his rights during a trial. He appeared capable of disclosing to his attorney relevant information concerning his perception of events at the time of the alleged crimes. He communicated adequately to allow him to testify relevantly in his own behalf should that be required during a trial. His psychotic symptoms-appeared to be under good control, making it unlikely that those symptoms would result in trial disruptions. There were no indications that his

current perception of his legal situation was compromised by symptoms of his mental illness.

Summary & Conclusions

Mr. Cowan does suffer from a mental disease or defect, with a well documented history of Paranoid Schizophrenia since at least 1987. When the symptoms of this disorder are not well controlled with appropriate treatment he experiences significant disruption in reality contact. Records document his having experienced auditory hallucinations, visual hallucinations, ideas of reference, and extensive paranoid delusions. It is interesting to note that the severity of these symptoms apparently varies quite a bit over time. Records indicate that Mr. Cowan can appear perfectly normal at times, while at other times he appears to be in an obviously psychotic state. Such variation in the intensity of psychotic symptoms is not unusual in an individual diagnosed as suffering from Paranoid Schizophrenia. It also appears likely that Mr. Cowan is a reasonably intelligent individual who is somewhat reluctant to reveal the symptoms of his mental illness. Thus, when his symptoms are under reasonably good control he appears able to "cover" his illness by not revealing his delusional thoughts. It is quite likely, however, that his underlying delusional beliefs persist even when the more overt signs of his mental illness are not readily apparent.

Mr. Cowan has responded favorably to treatment received at Montana State Hospital. He now shows a reasonable understanding of his legal situation and appears capable of assisting his attorney in managing his legal case. He is considered competent to proceed in facing his criminal charges at the present time. In all likelihood, he will remain competent throughout legal proceedings provided that he continues his program of chemotherapy. He might, however, also benefit from some ongoing mental health counseling designed to

assist him in managing the stress of a trial.

I hope this additional information is of assistance in reviewing Mr. Cowan's case. Please feel free to contact me at 693-7474 if any additional information is required.

Sincerely,

John Van Hassel, Ph.D.
Psychologist
Forensic Treatment Facility

JVH/pc

cc: Defense Attorney
County Attorney

APPENDIX J

TRANSCRIPT OF PROSECUTION CLINICAL PSYCHOLOGIST DR. HERMAN WALTERS' TRIAL TESTIMONY REGARDING DIAGNOSIS OF DEFENDANT, RULING OUT POSSIBILITY OF MALINGERING; STATE OF MIND AT TIME OF ASSAULT

December 20, 1990:

CROSS-EXAMINATION

BY MS. BORG:

Q Dr. Walters, if I understand your testimony, you had dealings with Joe Cowan on three different occasions, and if can categorize it, more success in dealing with him on the first two occasions than on the third; is that correct?

A Yes.

Q But during those first two times were there times or situations when he became suddenly preoccupied and would ignore you and ignore your questions and attend to other things in his mind, as opposed to attend to you and your inquiries?

A Yes.

Q Were there times during those first two interviews where it could be possible that he was attending to his own hallucinations or his own disordered thoughts at the time?

A Yes.

Q But if I understand it, it was in that third interview with you when he became really highly disorganized and appeared delusional and hallucinatory just in general?

A Yes.

Q Did he at that time become progressively less and less coherent, rational and comprehensible, and at

the same time become louder and more agitated?

A Yes.

Q Do you think that in this third interview when he is as described, that he was genuinely experiencing very serious emotional disruptions and was, in fact, psychotic?

A I think it is highly probable.

Q Okay. Now, the flip side of that would be that he was malingering or faking for you; is that correct?

A Yes.

Q And you have told Mr. Anderson that you had certain concerns throughout your evaluation of him that he might be malingering?

A Yes.

Q And you listed for us some reasons that that might be, among them his motive in the criminal justice setting, his native intelligence, and the fact that through prior hospitalizations for this kind of illness he could have made observations of the required behaviors—

A Yes.

Q —right?

A Yes.

Q Did you, however, work through your issues of malingering and get to a bottom line and decide that he had been or had not been malingering during this process?

A Yes, I reached a point where I felt that a preponderance of the evidence came down in one direction on that question.

Q What was the direction?

A That he may have been exaggerating somewhat, but he was not malingering; that he is genuinely disturbed.

Q You told Mr. Anderson that one of the outcomes of your concern about this malingering was your suggestion that he then go to the State Hospital for a twenty-four-hour observation over a long period of time?

A Yes.

Q And you know he did that?

A Yes.

Q Have you had the opportunity to review the evaluation that came back from Warm Springs after their observation of him?

A Yes.

Q And did they find malingering?

A No.

Q Does this then give more credence to your ultimate bottom line that he was not faking, that he was seriously mentally ill?

A Yes, although it still leaves open that there may be some exaggeration.

Q Notwithstanding some exaggeration, you don't find any evidence now that ultimately concerns you about your bottom line that he is malingering or faking this to the point that everybody is fooled?

A I don't believe so.

Q Now, did he at one time tell you that he has been hospitalized in North Carolina for headache problems?

A Yes.

Q And that he was seeing things that weren't there and had bad eyesight?

A Yes.

Q Does this seem to be kind of an underreporting, an underexaggeration of a serious mental illness?

A Yes.

Q So he may be downplaying his problems. Would that be because he may be embarrassed and wouldn't want you to know how sick he really was?

A That is possible.

Q And he clearly described the someone that he encountered at the house as a really big woman, bigger and stronger than me?

A Yes.

Q Did he have any fear of what this big person would do to him?

A Yes.

Q What was that?

A He was afraid that she would harm him.

Q Do you think that fear was real?

A I don't know.

Q You saw him when you described him as being under the effect of hallucinations and delusions, but did he also report to you during your interviews that he sometimes hears voices?

A Yes.

Q Did he then, during that third interview, give you more detail about these hallucinations and these voices and these delusions?

A Well, he talked about them, but it was in a very fragmented, virtually unintelligible manner.

Q Did he discuss with you a robot?

A Yes.

Q Do you remember the nature of that discussion?

A This was during the third interview. Basically he indicated that he believed there were such creatures, that they looked human but were not, and that they were persecuting him and that he had to retaliate against them.

Q Did he describe the person—or this large woman at the Work Center as a robot?

A No.

Q Did he discuss with you any of the contents of the body of the person or thing at the Work Center?

A Not really. He made reference to a robot, but he didn't talk about her in those terms.

Q Dr. Walters, did you write a report as a result of your evaluation in this case?

A Yes.

Q Do you have a copy of it in front of you?

A Yes.

Q I'm looking, Doctor, at page 5 of that report, and I'm in the second paragraph—or the first full paragraph about in the middle—

A Okay.

Q —and I see that you made a statement, "He also expressed the belief that many of what appear to be

people are actually little robots and that the person he attacked at the Lolo Work Camp was not really a woman, but was a mechanical robot. He wanted the red stuff. It isn't really blood, it is just some other red stuff that comes out of them."

A Yeah, I stand corrected on my previous answer.

Q So this is a correct reflection of his comments to you.

A Yes.

Q Did he ever lead you to believe that he saw other people as robots?

A Yes.

Q Specifically who?

A Not identifying individuals by names, just that he viewed that there were other such—I guess I will call them people or things around.

Q And does he have some sense or did he report at that time some sense that the robots were out to get him and he needed to protect himself from the robots?

A Yes.

Q Did you inquire of him, Dr. Walters, as to whether he perceived me as a robot?

A Yes.

Q What was that discussion?

A That—well, I did this in the context of attempting to assess his competence, which involves the individual's ability to relate to their attorney, and I asked if he thought you were a robot, and he said he wasn't sure.

Q And that gave, in part, rise to your ultimate concerns that he was not functioning properly to go through the court proceedings; is that correct?

A Yes.

Q Is that in large part why Mr. Cowan then went to the Montana State Hospital for further evaluation?

A That was a strong part or an important part of my decision to make that recommendation.

Q Okay. And specifically, then, looking at the tests that you gave, you had some similar problems

giving the tests and getting responses as you had in the interview setting; is that correct?

A Yes.

Q And your impression was that he was of superior general intelligence—so there was no intellectual reason he couldn't do the tests—but you report scores were significantly obscured by motivational factors and possible emotional preoccupations.

A Yes

Q Is one of those motivational factors simply your suggestion that he had done too many tests for too many other evaluators in the past and he was simply bored with the process?

A Yes.

Q But you had success in giving him the Rorschach or getting him to respond to certain of the Rorschach and Ink Blot tests?

A Minimally.

Q Did you find any responses that were typical of the kind given by seriously disturbed individuals?

A Yes.

Q Would you describe those, please?

A These are on two of the ten responses that he gave. Basically his productions were without form. The contents was very dysphoric. His ability to rationalize and respond to the test was seriously compromised.

Q Did this show to you or suggest to you a breakdown in reality testing of a major proportion?

A Yes.

Q Was his reaction one that was typical of seriously mentally-ill persons?

A Yes.

Q What was that reaction?

A Well, rather than having any reflective response to his own productions, he thought I was showing him pictures of this terrible stuff.

Q So he expressed some sort of contempt and disgust at you and the test?

A Yes.

Q And that is a response that is more typical of persons seriously mentally ill than others?

A The entire package of his responses, including that, led me to that conclusion.

Q Now, were these responses of significance anything that he could have faked, or are these pretty sophisticated responses and indicative of his illness?

A I believe they were indicative of illness. It is not impossible to fake them; a knowledgeable individual could do that.

Q But more likely than not in the overall picture here, those were appropriate and genuine responses of Joe Cowan?

A I believe so.

Q You considered, as I understand it, police officers' reports, perhaps the arresting officer's or the officers' on the scene, and the indication you received from personnel in the jail concerning his functioning, did you not?

A Yes.

Q And did some of those reports suggest no indications of disturbed behaviors or anything of an unusual nature?

A Yes.

Q Okay. But you also talked to the victim or read her statement, did you not?

A Read her statement.

Q And as between the reports of the officers and the witness at the time, which one of those do you think is more appropriately characteristic of his functioning at the time of the incident?

A They are both really important. I suppose if I had to draw a line and choose one versus the other, I would choose the response and description of the victim, but I would also have to take into account the fact that she was in just a nightmarish, horrific situation. So I would be very interested in the observations of someone who had not been through that, but who had been present close to the time of the incident.

Q Okay, but in dealing with Mr. Cowan yourself, you saw what you describe as sudden onsets and sudden shifts in his mood and his behaviors, did you not?

A Yes.

Q So is it not entirely possible that at the time he encountered Maggie Doherty, his behavior could be psychotic and irrational and disordered, but not at the time he encountered deputies after the incident?

A It is possible.

Q You reviewed prior hospitalization records and you diagnosed paranoid—or schizophrenia of a paranoid type, and you have since then seen an additional evaluation. Are you sure of your diagnosis?

A Reasonably.

Q Have you learned anything that makes you feel that it is not appropriate or a proper diagnosis?

A One point, there is reference in his previous records to a mood disorder, and if I recall correctly, there is reference to that by Dr. Shea and also by Warm Springs. I did not directly observe that, and that could slightly color the diagnosis. It would still be psychosis, and it would still involve schizophrenia.

Q Are psychosis and schizophrenia in your professional opinion serious mental illnesses?

A Yes. Psychosis is a generic term, and schizophrenia is a subtype.

Q And it is your opinion that at least during the third interview with Mr. Cowan, you actually witnessed him in one of these psychotic states—

A Yes.

Q—where his thoughts were disordered and he was hallucinating and acting in a delusional fashion?

A Yes.

Q Now, it is my understanding that what you have told us here is that even—and have you not told us it is more likely than not that he was delusional or in a psychotic state at the time of the incident?

A I don't think I said that.

Q Did you say it was possible?

A I said it was possible. I really can't say.

Q Okay, but there is a possibility—and it is a reasonable possibility—that he could have been psychotic at the time of the incident?

A May I explain?

Q Please.

A In the description he provided me of the incident, he did not make reference to any material that would have led me to suspect a delusional process. However, there were also numerous elements of the facts that are at variance with what is established by other believable sources of information. The presence of his disorder, his history of it, plus that kind of behavior certainly raised the possibility of psychosis at that time, but I don't have a way of establishing with any conviction whether he was or whether he wasn't.

Q There is a possibility; that is fair?

A Yes.

Q And that is not exaggerating or slanting your testimony?

A No.

Q And if he were in a psychotic state at that time, is it likely that his behavior would be influenced by a delusional process?

A Yes.

Q Do you have an opinion as to how much that would be or how that would manifest itself?

A Yes

Q What is that?

A In general the presence of a delusion provides false assumptions, false premises on which the individual then acts. The acts are likely to be consistent with the delusions, but to outward appearances bizarre or unacceptable or strange, because we don't know the premises and we don't make the connection that they do.

Q Okay. Just because he is psychotic or acting in this delusional state, I take it, does not mean that he

could not deliberately act or form a purpose within his delusion?

A Within the delusions he could act with purpose and he could know what he was attempting to do.

Q And that would mean, Dr. Walters, if he were thirsty he could perform with purpose getting a drink and carry out that act and satisfy his thirst?

A Yes.

Q That, I take it, also means if he perceived himself threatened by a robot or a machine, he could act or he could do an act to protect himself from that robot and have the purpose of protection?

A Yes.

Q So that his acts—he might have some sort of ability to reason about his acts, but because of the delusion or the disordered thoughts or the bizarre behavior, his perceptions of the results or his perceptions of the circumstances would be skewed?

A That is possible, yes.

[End of partial transcript]

APPENDIX K

DSM III-R:
Schizophrenia

The essential features of this disorder are the presence of characteristic psychotic symptoms during the active phase of the illness and functioning below the highest level previously achieved (in children or adolescents, failure to achieve the expected level of social development), and a duration of at least six months that may include characteristic prodromal or residual symptoms. At some phase of the illness Schizophrenia always involves delusions, hallucinations, or certain characteristic disturbances in affect and the form of thought. The diagnosis is made only when it cannot be established that an organic factor initiated and maintained the disturbance. The diagnosis is not made if the symptoms are due to a Mood Disorder or Schizoaffective Disorder.

Some approaches to defining Schizophrenia have emphasized the tendency toward a deteriorating course (Kraepelin), underlying disturbances in certain psychological processes (Bleuler), or pathognomonic symptoms (Schneider). In this manual the concept is not limited to illnesses with a deteriorating course, although a minimal duration of illness is required since some evidence suggests that illnesses of briefer duration (here called Schizophreniform Disorder) are likely to have different external correlates, such as family history and likelihood of recurrence. The approach taken here excludes illnesses without overt psychotic features, which have sometimes been referred to as Latent, Borderline, or Simple Schizophrenia. Such conditions are likely to be diagnosed in this manual as Personality Disorders, e.g., a Schizotypal Personality Disorder. People who develop a major depressive or manic syndrome for an extended period relative to the duration of the disturbance are not classified as having Schizophrenia, but

rather as having either a Mood or Schizoaffective Disorder.

Thus, this manual utilizes clinical criteria that include both a minimal duration and a characteristic symptom picture to identify a group of conditions that has validity in terms of differential response to somatic therapy, presence of a familial pattern, and a tendency toward onset in early adult life, recurrence, and deterioration in social and occupational functioning.

Functioning below highest level previously achieved. During the course of the disturbance, functioning in such areas as work, social relations, and self-care is markedly below the highest level achieved before onset of the disorder. If the onset is in childhood or adolescence, there is failure to achieve the expected level of social development. This diagnostic requirement is included so that people with an isolated symptom, such as an encapsulated delusion, but without a reduction in social or work functioning, are not given the diagnosis of Schizophrenia, which typically involves impairment in more than one area of functioning.

Characteristic symptoms involving multiple psychological processes. Invariably there are characteristic disturbances in several of the following areas: content and form of thought, perception, affect, sense of self, volition, relationship to the external world, and psychomotor behavior. It should be noted that no single feature is invariably present or seen only in Schizophrenia.

Content of thought. The major disturbance in the content of thought involves delusions that are often multiple, fragmented, or bizarre (i.e., involving a phenomenon that in the person's culture would be regarded as totally implausible, e.g., thought broadcasting, or being controlled by a dead person). Simple persecutory

delusions involving the belief that others are spying on, spreading false rumors about, or planning to harm the person are common. Delusions of reference, in which events, objects, or other people are given particular and unusual significance, usually of a negative or pejorative nature, are also common. For example, the person may be convinced that a television commentator is mocking him.

Certain delusions are observed far more frequently in Schizophrenia than in other psychotic disorders. These include, for instance, the belief or experience that one's thoughts, as they occur, are broadcast from one's head to the external world so that others can hear them (thought broadcasting); that thoughts that are not one's own are inserted into one's mind (thought insertion); that thoughts have been removed from one's head (thought withdrawal); or that one's feelings, impulses, thoughts, or actions are not one's own, but are imposed by some external force (delusions of being controlled). Less commonly, somatic, grandiose, religious, and nihilistic delusions are observed.

Form of thought. A disturbance in the form of thought is often present. This has been referred to as "formal thought disorder," and is different from a disorder in the content of thought. The most common example of this is loosening of associations, in which ideas shift from one subject to another, completely unrelated or only obliquely related subject, without the speaker's displaying any awareness that the topics are unconnected. Statements that lack a meaningful relationship may be juxtaposed, or the person may shift idiosyncratically from one frame of reference to another. When loosening of associations is severe, the person may become incoherent, that is, his or her speech may become incomprehensible.

There may be poverty of content of speech, in

which speech is adequate in amount, but conveys little information because it is vague, overly abstract, or overly concrete, repetitive, or stereotyped. The listener can recognize this disturbance by noting that little if any information has been conveyed although the person has spoken at some length. Less common disturbances include neologisms, perseveration, clanging, and blocking.

Perception. The major disturbances in perception are various forms of hallucinations. Although these occur in all modalities, the most common are auditory hallucinations, which frequently involve many voices the person perceives as coming from outside his or her head. The voices may be familiar, and often make insulting remarks; they may be single or multiple. Voices speaking directly to the person or commenting on his or her ongoing behavior are particularly characteristic. Command hallucinations may be obeyed, which sometimes creates danger for the person or others. Occasionally, the auditory hallucinations are of sounds rather than voices.

Tactile hallucinations may be present, and typically involve electrical, tingling, or burning sensations. Somatic hallucinations, such as the sensation of snakes crawling inside the abdomen, are occasionally experienced. Visual, gustatory, and olfactory hallucinations also occur, but with less frequency, and, in the absence of auditory hallucinations, always raise the possibility of an Organic Mental Disorder. Other perceptual abnormalities include sensations of bodily change; hypersensitivity to sound, sight, and smell; illusions; and synesthesias.

Affect. The disturbance often involves flat or inappropriate affect. In flat affect, there are virtually no signs of affective expression; the voice is usually monotonous and the face, immobile. The person may

complain that he or she no longer responds with normal emotional intensity or, in extreme cases, no longer has feelings. In inappropriate affect, the affect is clearly discordant with the content of the person's speech or ideation. For example, while discussing being tortured by electrical shocks, a person with Schizophrenia, Disorganized Type, may laugh or smile. Sudden and unpredictable changes in affect involving inexplicable outbursts of anger may occur.

Although these affective disturbances are almost invariably part of the clinical picture, their presence is often difficult to detect except when they are in an extreme form. Furthermore, antipsychotic drugs have effects that may appear similar to the affective flattening seen in Schizophrenia.

Sense of self. The sense of self that gives the normal person a feeling of individuality, uniqueness, and self-direction is frequently disturbed in Schizophrenia. This is sometimes referred to as a loss of ego boundaries, and frequently is evidenced by extreme perplexity about one's own identity and the meaning of existence, or by some of the specific delusions described above, particularly those involving control by an outside force.

Volition. The characteristic disturbances in volition are most readily observed in the residual phase. There is nearly always some disturbance in self-initiated, goal-directed activity, which may grossly impair work or other role functioning. This may take the form of inadequate interest, drive, or ability to follow a course of action to its logical conclusion. Marked ambivalence regarding alternative courses of action can lead to near-cessation of goal-directed activity.

Impaired interpersonal functioning and relationship to the external world. Difficulty in interpersonal

relationships is almost invariably present. Often this takes the form of social withdrawal and emotional detachment. When the person is severely preoccupied with egocentric and illogical ideas and fantasies and distorts or excludes the external world, the condition has been referred to as "autism." Some with the disorder, during a phase of the illness, cling to other people, intrude upon strangers, and fail to recognize that excessive closeness makes other people uncomfortable and likely to pull away.

Psychomotor behavior. Various disturbances in psychomotor behavior are observed, particularly in the chronically severe and acutely florid forms of the disorder. There may be a marked decrease in reactivity to the environment, with a reduction in spontaneous movements and activity. In extreme cases the person appears unaware of the nature of the environment (as in catatonic stupor); may maintain a rigid posture and resist efforrts to be moved (as in catatonic rigidity); may make apparently purposeless and stereotyped, excited motor movements not influenced by external stimuli (as in catatonic excitement); may voluntarily assume inappropriate or bizarre postures (as in catatonic posturing); or may resist and actively counteract instructions or attempts to be moved (as in catatonic negativism). In addition, odd mannerisms, grimacing, or waxy flexibility may be present.

Associated features. Almost any symptom can occur as an associated feature. The person may appear perplexed, disheveled, or eccentrically groomed or dressed. Abnormalities of psychomotor activity—e.g., pacing, rocking, or apathetic immobility—are common. Frequently there is poverty of speech, that is, a restriction in the amount of spontaneous speech, so that replies to questions tend to be brief, concrete, and unelaborated. Ritualistic or stereotyped behavior associated with magical thinking often occurs. Dysphoric

mood is common, and may take the form of depression, anxiety, anger, or a mixture of these. Depersonalization, derealization, ideas of reference, and illusions are often present, as are hypochrondiacal concerns, which may or may not be delusional. Typically, no disturbance in the sensorium is evident, although during a period of exacerbation of the disorder, the person may be confused or even disoriented, or have memory impairment.

Age at onset. Onset is usually during adolescence or early adulthood, but the disorder may begin in middle or late adult life. Many studies indicate a somewhat earlier onset in males than in females.

Course. As noted previously, the diagnosis of Schizophrenia requires that continuous signs of the illness have been present for at least six months, which always includes an active phase with psychotic symptoms. When active or positive symptoms are prominent, negative symptoms, such as social withdrawal and lack of initiative, may be present, but difficult to identify. If the active phase lasts more than six months, it is not necessary to identify a distinct prodromal or residual phase, even though prodromal/residual symptoms have usually been present.

The development of the active phase of the illness is generally preceded by a *prodromal phase* in which there is a clear deterioration from a previous level of functioning. This phase is characterized by social withdrawal, impairment in role functioning, peculiar behavior, neglect of personal hygiene and grooming, blunted or inappropriate affect, disturbances in communication, bizarre ideation, unusual perceptual experiences, and lack of initiative, interests, or energy. Friends and relatives often describe the onset of prodromal symptoms as a change in personality or as no longer "being the same person." The length of this prodromal phase is extremely variable, and its onset may be difficult to date

accurately. The prognosis is especially poor when the prodromal phase has taken an insidious, downhill course over many years.

During the active phase, psychotic symptoms—e.g., delusions, hallucinations, loosening of associations, incoherence, and catatonic behavior—are prominent. The specific psychotic symptoms are noted in criterion A of the diagnostic criteria (p. 134). In order to make the diagnosis, the psychotic symptoms must persist for at least one week, unless they are successfully treated. Onset of the active phase, either initially or as an exacerbation of a preexisting active phase, may be associated with a psychosocial stressor.

Usually a *residual phase* follows the active phase of the illness. The clinical picture of this phase is similar to that of the prodromal phase, except that affective blunting or flattening and impairment in role functioning tend to be more common in the residual phase. During this phase some of the psychotic symptoms, such as delusions or hallucinations, may persist, but may no longer be accompanied by strong affect.

A return to full premorbid functioning in this disorder is not common. Full remissions do occur, but their frequency is currently a subject of controversy. The most common course is probably one of acute exacerbations with residual impairment between episodes. Residual impairment often increases between episodes during the initial years of the disorder. There is some evidence, however, that in many people with the disorder, the residual symptoms become attenuated in the later phases of the illness.

Numerous studies have indicated a group of factors associated with good prognosis, including absence of premorbid personality disturbance, adequate premorbid social functioning, precipitating events, abrupt

onset, onset in mid-life, a clinical picture that involves confusion, and a family history of Mood Disorder.

Because knowledge of the course is very important for planning treatment, and because differences in course may reflect fundamental differences among people with Schizophrenia, a separate digit is provided for coding the course as Subchronic, Chronic, Subchronic with Acute Exacerbation, Chronic with Acute Exacerbation, or In Remission (for criteria, see p. 195).

Since a six-month duration of illness is required for the diagnosis, there is no acute type. (The DSM-III-R diagnosis of Schizophreniform Disorder is the nearest equivalent of the ICD-9-CM concept Acute Schizophrenic Episode. Frequently, an episode of Schizophreniform Disorder will persist for more than six months, in which case the diagnosis should be changed to Schizophrenia.)

Impairment. Invariably, at some point in the disorder as described above, there is impairment in several areas of routine daily functioning, such as work, social relations, and self-care. Supervision may be required to ensure that nutritional and hygienic needs are met and to protect the person from the consequences of poor judgment, cognitive impairment, or actions based on delusions or in response to hallucinations. Between episodes of illness the extent of disability may range from none to disability so severe that institutional care is required.

Complications. Although violent acts performed by people with this disorder often attract public attention, whether their frequency is actually greater than in the general population is not known. What is known is that the life expectancy of people with Schizophrenia is shorter than that of the general population because of an

increased suicide rate and death from a variety of other causes.

Premorbid personality. The premorbid personalities of people who develop Schizophrenia are often described as suspicious, introverted, withdrawn, eccentric, or impulsive; Paranoid, Schizoid, Schizotypal, or Borderline Personality Disorder may be present. In such cases, since it can have prognostic significance, the Personality Disorder should be noted on Axis II, followed by "(Premorbid)."

Predisposing factors. The diagnosis is made more commonly among the lower socioeconomic groups. The reasons for this are unclear, but may involve downward social drift, lack of upward socioeconomic mobility, and high stress.

Certain patterns of family interaction have been hypothesized to predispose to the development, onset, relapse, or chronicity of Schizophrenia; but interpretations of the evidence supporting these hypotheses are controversial.

Prevalence. Studies in Europe and Asia, using a relatively narrow concept of Schizophrenia, have reported a lifetime prevalence rate of from 0.2% to almost 1% Studies in the United States that have used broader criteria and surveyed urban populations have reported higher rates.

Sex ratio. The disorder is apparently equally common in both sexes.

Familial pattern. All investigators have found a higher prevalence of the disorder in first-degree biologic relatives of people with Schizophrenia than would be expected in the general population. Included are studies

in which the adopted offspring of people with Schizophrenia have been reared by parents who do not have the disorder. Twin, studies consistently show a higher concordance rate of Schizophrenia in monozygotic than in dizygotic twins. However, the experience of being a monozygotic twin does no in itself appear to predispose to the development of Schizophrenia. Although genetic factors have been proven to be involved in the development of the illness, the existence of a substantial discordance rate, even in monozygotic twins, indicates the importance of nongenetic factors.

APPENDIX L

ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS

American Bar Association, 1989

Commentary to Section 7-6.1

The aim of this part of the Standards and its associated parts is to respect the moral basis of the mental nonresponsibility [insanity] defense while avoiding the creation of a framework that leaves the public distrustful of its institutions.

In reexamining the defense, the options run the gamut from its abolition to the product test and Rhode Island's "justly responsible" standard. The introduction to this part has already noted that the Association considers the abolition option indefensible. The moral basis of the mental nonresponsibility defense is undeniable and has been reaffirmed throughout the history of western civilization.

The Mens Rea *Limitation*

However, before leaving this point and as a means of emphasizing it, mention must be made of one currently popular "alternative" proposal to the defense. This approach, which would permit evidence of mental condition bearing on the requisite mental or culpability element of the crime but eliminate mental nonresponsibility [insanity] as an independent, exculpatory doctrine, was considered for a time by Congress and was adopted in Idaho, Montana, and Utah. The ABA has rejected it out of hand. Such a jarring reversal of hundreds of years of moral and legal history would constitute an unfortunate and unwarranted over

reaction to the problems typified by the *Hinkley* verdict.

Historically, it is true, sanity was related organically to the concept of *mens rea*, which originally was regarded as a generalized requirement of moral blameworthiness required for criminal liability In the twentieth century, however, *mens rea* terminology has come to refer to the specific state of mind required for the conviction of particular criminal offenses. Thus, today, if there were no independent nonresponsibility [insanity] defense, defendants could be convicted of crimes as long as they knew what they were doing at the time of an offense and possessed the intent to commit it.

The issue of criminal blameworthiness merits deeper inquiry because it implies a certain *quality* of knowledge and intent transcending a minimal awareness and purposefulness. Otherwise, for example, a defendant who knowingly and intentionally killed his son under the psychotic delusion that he was the biblical Abraham, and his son the biblical Isaac, could be held criminally responsible. The Montana, Idaho, and Utah enactments, on their face, would deny a defense to such a defendant.

Because the *mens rea* approach asks those who administer and apply the law to condemn as criminal the acts of mentally ill defendants who are grossly out of touch with reality, an argument could be made that it violates the due process and cruel-and-unusual-punishment clauses of the Constitution.[1] But constitutional support for the position endorsed in this standard is not necessary. As Professor Bonnie has pointed out, the *mens rea* limitation forces judges and juries confronted with defendants who are uncontrovertibly psychotic either to return morally obtuse convictions or to acquit in outright defiance of the law. Neither alternative is palatable. The abolitionist approach as embodied in the *mens rea* limitation inhibits if not prevents the exercise

of humane judgment that has distinguished our criminal law heritage. For this reason the Association has rejected the *mens rea* approach.

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[1] Early in this century three state supreme courts relying on either due process, equal protection or eighth amendment grounds or a combination thereof, overturned statutes that directly or indirectly abolished the defense of mental nonresponsiblity [insanity]. *Sinclair v State* 161 Miss. 142, 132 So. 551(1931); *State v Lange* 168 La. 958, 123 So. 639 (1929); *State v Strasbourg* 60 Wash. 106, 110 P. 1020 (1910). However, unlike statutes implementing the *mens rae* approach, the statutes held unconstitutional in those cases did not replace the defense with any defense or doctrine that would have permitted consideration of mental abnormality. Thus the precedential value of these early cases is suspect.

Constitutional arguments in support of the nonresponsibility defense nonetheless can be made. More recent United States Supreme Court decisions imply that the fairness concerns underlying "substantive" due process and the proportionality idea associated with the cruel-and-unusual-punishment clause require the criminal liability be predicated on an act that is blameworthy. *Robinson v California*, 370 U.S. 660 *reh'g denied*, 372 U .S. 905 (1962); *Lambert v California*, 355 U.S. 225 *(1957), reh'g denied* 355 U.S. 937 (1958). See Jeffries & Stephen, *Defense, Presumptions and Burden of Proof in the Criminal Law*, 88 Yale L.J. 1325, 1370-1379 (1979). Given the Court's wary use of due process and proportionality analysis it is not clear whether future cases will provode a firmer ground for linking these notions to arguments favoring the defense of mental nonresponsibility.

Supreme Court, U.S.
MAR 2 1994

No. 93-1264

In The
SUPREME COURT OF THE UNITED STATES
October Term 1993

JOE JUNIOR COWAN,

Petitioner,

vs.

THE STATE OF MONTANA,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Montana

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Does Montana's statutory scheme, which does not provide for an affirmative insanity defense, violate the Eighth or Fourteenth Amendment to the United States Constitution?

2. In this case, which involved a nonjury trial on a charge of attempted deliberate homicide, did the Montana statute which states that "[i]n a deliberate homicide, knowledge or purpose may be inferred from the fact that the accused committed a homicide and no circumstances of mitigation, excuse, or justification appear," result in the application of an impermissible presumption in violation of *Sandstrom v. Montana*, 442 U.S. 510 (1979)?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

JURISDICTION 1

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 5

ARGUMENT 6

I. MONTANA'S STATUTORY SCHEME, WHICH DOES NOT PROVIDE AN AFFIRMATIVE INSANITY DEFENSE, DOES NOT VIOLATE THE EIGHTH OR FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION 6

II. MONTANA'S STATUTE REGARDING AN INFERENCE IN DELIBERATE HOMICIDE CASES DID NOT RESULT IN THE APPLICATION OF A CONCLUSIVE PRESUMPTION 13

CONCLUSION 14

TABLE OF AUTHORITIES

CASES

Drope v. Missouri,
420 U.S. 162 (1975) 12

Durham v. United States,
214 F.2d 862 (D.C. Cir. 1954) 10

Foucha v. Louisiana,
112 S. Ct. 1780 (1992) 12

Leland v. Oregon (1952),
343 U.S. 790,
reh. denied, 344 U.S. 848 (1952) 5, 8, 11, 12

Malinski v. New York,
324 U.S. 401 (1945) 9

Medina v. California,
112 S. Ct. 2572 (1992) 11

Pate v. Robinson,
383 U.S. 384 (1966) 12

Patterson v. New York,
432 U.S. 197 (1977) 11

Penry v. Lynaugh,
492 U.S. 302 (1989) 13

Powell v. Texas,
392 U.S. 514 (1968) 9, 11, 12

Sandstrom v. Montana,
442 U.S. 510 (1979) ..... i, 13, 14

TABLE OF AUTHORITIES
(Cont.)

Snyder v. Massachusetts,
291 U.S. 97 (1934) 9

Stanford v. Kentucky,
492 U.S. 361 (1989) 13

State v. Byers,
861 P.2d 860 (Mont. 1993) 4, 5

State v. Cowan,
861 P.2d 884 (Mont. 1993) 1

State v. Korell,
690 P.2d 992 (Mont. 1984) 4, 5

STATUTES

Montana Code Annotated, 1989
§ 45-5-102 1
§ 45-5-112 13
§ 45-6-204 1
§ 46-14-102 6
§ 46-14-103 6
§ 46-14-221 6
§ 46-14-222 6
§ 46-14-311 7
Tit. 46, ch. 18 7

United States Code
Tit. 28, § 1254(1) 1

TABLE OF AUTHORITIES
(Cont.)

CONSTITUTIONS

United States Constitution
Amend. VIII ..... i, 5, 6, 12, 13
Amend. XIV ..... i, 5, 6

JURISDICTION

Jurisdiction under 28 U.S.C. § 1254(1) exists with respect to the petition.

STATEMENT OF THE CASE

Following a bench trial held December 17-20, 1990, in Missoula County, Montana, the Petitioner was found guilty of attempted deliberate homicide, in violation of Mont. Code Ann. § 45-5-102 (1989), and aggravated burglary, in violation of Mont. Code Ann. § 45-6-204 (1989). He was thereafter committed to the Montana Department of Institutions for sixty (60) years for the attempted deliberate homicide and twenty (20) years for the aggravated burglary. The judgment provided that he be initially placed at the Montana State Prison, until such time as the director of the Department of Institutions determines that his treatment requires placement at a different facility. (Pet. App. 37a.)

Cowan appealed his convictions to the Montana Supreme Court. The convictions were affirmed in *State v. Cowan*, 861 P.2d 884 (1993). (Pet. App. 1a.)

In April 1990 Cowan entered, without permission, the residence of Forest Service worker Margaret Doherty, located at a Forest Service Work Center near Lolo, Montana. When Doherty returned to the Center, she discovered someone had been occupying the residence, but did not immediately find Cowan. While she was on the telephone attempting to find out whether another worker may have been assigned to the center, she heard someone on the line. She assumed that someone was listening on one of the other two lines of the center, and she told the person to get out, that she was calling the police.

While Doherty was on the telephone with the sheriff's department in Missoula, approximately 18 miles away, she saw Cowan approach the house. She locked the front door, confirmed that the other doors and the windows were locked, and got a shotgun she kept at the house. Cowan started banging on the living room door and Doherty yelled, "Who are you and what do you want?" Cowan did not respond. Doherty went to the kitchen and loaded the shotgun with the only shells available, scatter shells used to scare bears. Cowan moved around the house to the kitchen door, trying the doorknob and banging on the door. Doherty again yelled, "Who are you and what do you want?" to which Cowan made comments like "society bitch" and "robot bitch." He would also mimic her when she would ask him who he was. At times he would look her in the eye through a window. When the sheriff's dispatch operator asked Doherty if there was some way she could leave, Doherty looked through a window and saw that the tires on her vehicle had been flattened.

As Doherty watched, Cowan went to her car and kicked at it, and pulled on the license plate on the back. Doherty then lost sight of him until he exited the nearby cookhouse carrying a tree-planting tool called a hodag. By looking at Cowan, Doherty judged that he was angry and serious.

Cowan approached the living room doors and smashed through both the outer door and the inner, heavier door with the hodag. When Doherty raised her shotgun to discharge a scatter shell in the direction of Cowan, the shotgun jammed and she was unable to pull the trigger completely. Cowan came across the living room at Doherty with the hodag in both hands, up like a baseball bat. Doherty backed into the kitchen and started working to get the door open. She was unable to do so before Cowan attacked her with the hodag, hitting her arms, back and shoulders. He continued to swing the hodag; eventually he

wrestled the shotgun from Doherty, but when he was unable to pull the trigger, he discarded it and picked up the hodag again. He also paused at one point to get a knife, which he discarded without using. Doherty suffered severe injuries to her skull, shoulder, ribs, and lung.

When sheriff's deputies arrived at the scene, one found Doherty lying in the kitchen. As the deputy started to search for Cowan, he was notified by the other deputy that Cowan was running into the woods. The other deputy testified that Cowan had disregarded her order to stop where he was. He said something about a backpack and ran around the cookhouse. Cowan was apprehended near the cookhouse and a Forest Service backpack was on the ground next to him.

At trial, the Petitioner presented testimony of a psychiatrist and a clinical psychologist. The psychiatrist did a mental status examination of Cowan during their one meeting and reviewed Cowan's prior mental health records. The psychiatrist concluded that Cowan suffers at times from schizophrenia, and that when he attacked Doherty, he was schizophrenic and in a psychotic state. As to the element of the crime charged relating to Cowan's mental state, the psychiatrist stated that, although he could have acted with purpose and knowledge, he did not have the conscious object to cause the death of a human being. On cross-examination, he admitted that, because he had not done a full forensic evaluation (including obtaining information from people who had observed Cowan before, during, and after the attack), he was not able to answer many questions related to the issue of whether Cowan had the alleged mental states during the commission of the crimes.

The psychologist concluded that Cowan suffers from paranoid schizophrenia and that he was "acting purposefully and knowledgeably in defending himself against a robot" during the attack of Doherty. He based this conclusion on

his assertion that Cowan experienced a sudden onset of psychosis just before the attack.

The State presented on rebuttal the testimony of Herman Walters, a psychologist, who also evaluated the defendant. During his first interviews with Walters, Cowan described Doherty as a very large, white woman. In the final interview, he referred to her as a robot. Walters concluded that Cowan suffers from paranoid schizophrenia. Walters initially considered the possibility that Cowan was malingering or falsifying during the evaluation, given Cowan's intelligence, his knowledge of psychotic behavior gained during prior hospitalizations, and the clear motive for such behavior by Cowan. He eventually concluded that Cowan was not malingering, but may have been exaggerating his condition. Walters testified that, although he does not think it possible to state with accuracy what is going through a person's mind, his opinion was that Cowan was able to act with purpose or knowledge at the time of the offenses.

The trial court entered findings of fact summarizing the facts of the attack and the arrest. The findings also referred to Cowan's prior arrest and mental health treatments. The court concluded that during his entry to the residence and his attack on Doherty, Cowan had the purpose to commit a deliberate homicide; he knew it was highly probable that the death of a human being would be caused by his attack. (Pet. App. 33a.)

On appeal, the Montana Supreme Court, following its review of the evidence supporting the convictions, stated:

> We have previously affirmed the constitutionality of the abolition of the insanity defense in terms of violation of the right to due process. [*State v.*] *Byers*, [861] P.2d [860, 867 (Mont. 1993)]; [*State v.*] *Korell*,

> 690 P.2d [992] at 1002 [(Mont. 1984)]. As we noted in *Byers* and *Korell*, the United States Supreme Court has determined that the Due Process Clause does not require the use of any particular insanity test or allocation of burden of proof. *Leland v Oregon* (1952), 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302, reh. denied, 344 U.S. 848 [(1952)].

(Pet. App. 9a.) As to Cowan's claim that his sentence violates the Eighth Amendment to the Constitution, the Court held:

> We reiterate that Cowan was not sentenced to prison, but was placed in the custody of the Department of Institutions. The court specifically stated its purpose to provide for treatment of Cowan's mental illness at a different facility if the Director of the Department of Institutions determines treatment at a different facility is needed.
>
> We hold that the sentence imposed by the District Court does not violate the Eighth and Fourteenth Amendments to the United States Constitution.

(Pet. App. 11a.)

SUMMARY OF THE ARGUMENT

The questions presented by the Petitioner do not raise significant constitutional or federal questions worthy of consideration by this Court. The decision of the Montana Supreme Court upholding Montana's statutes does not conflict with decisions of this Court. Contrary to

the Petitioner's assertion, the issues raised by the Petitioner have been settled by this Court and the Montana Supreme Court decision is consistent with such relevant precedent. Montana's statutes regarding mental disease or defect do not violate the Eighth or Fourteenth Amendment to the Constitution and the statute regarding an inference of mental state in a deliberate homicide did not result in the application of a conclusive presumption in this case.

----------♦----------

ARGUMENT

I. MONTANA'S STATUTORY SCHEME, WHICH DOES NOT PROVIDE AN AFFIRMATIVE INSANITY DEFENSE, DOES NOT VIOLATE THE EIGHTH OR FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Petitioner asserts that Montana's statutory scheme is unconstitutional. He argues that this Court has not decided the issue of whether an affirmative insanity defense is required by the Constitution and that this case should be reviewed to decide that issue. The Petitioner's argument is stated in general terms and is unsupported by legal authority.

Montana's criminal procedure code allows consideration of a defendant's mental disease or defect at three stages of the criminal justice process. First, the defendant may be examined to determine whether he is able to understand the proceedings against him or to assist in his own defense. Mont. Code Ann. § 46-14-103 (1989). His fitness to proceed is a determination made by the district court prior to trial. Mont. Code Ann. §§ 46-14-221 and -222 (1989).

Second, a defendant may introduce evidence of mental disease or defect at trial whenever it is relevant to prove that he did not have a state of mind which is an element of the offense charged. Mont. Code Ann. § 46-14-102 (1989). Third, a defendant who has been convicted of a crime may claim during sentencing that at the time of the offense he was suffering from a mental disease or defect which "rendered the defendant unable to appreciate the criminality of the defendant's behavior or to conform the defendant's behavior to the requirements of law." Mont. Code Ann. § 46-14-311 (1989). A sentencing court presented with such a claim must examine all relevant evidence introduced at trial and any additional relevant evidence presented before the sentence is imposed. *Id.* If the court finds that the defendant was not suffering from a mental disease or defect described in Mont. Code Ann. § 46-14-311, it must sentence him as required in Mont. Code Ann. tit. 46, ch. 18 (1989).

Thus, the statutes provide consideration of a mental disease or defect during a pretrial competency review, during trial, and during sentencing. However, the defense of mental disease or defect is not an affirmative defense at the trial or guilt phase. A defendant is not required to disprove the mental state element of the crime charged; at most, a defendant must produce enough evidence to raise a reasonable doubt as to that element. Such production of evidence would lead to an acquittal, as the state is required to prove all elements of the crime beyond a reasonable doubt. In sum, the law allows conviction of a person who has a mental disease or defect but who formed the requisite mental state.

In this case, Cowan's mental disease or defect was considered at all stages of his criminal prosecution. Prior to trial, he was evaluated and, at one time, declared incompetent to stand trial. Thereafter, he was found competent and was tried for attempted deliberate homicide

and aggravated burglary. The court, as factfinder, found that he had acted with the mental state required for the charged crimes, i.e., that he acted purposely and knowingly when committing the crimes. At the sentencing phase of his case, Cowan's schizophrenia was considered and the court sentenced him to the state department of institutions, with determination of his placement to be made pursuant to his need for treatment.

In *Leland v. Oregon*, 343 U.S. 790 (1952), this Court reviewed Oregon statutes which required a defendant to establish his insanity beyond a reasonable doubt. Relying on the fact that the prosecution was required to prove every element of the charged crime beyond a reasonable doubt, the Court held that the statutes do not violate due process. The Court's discussion of the Due Process Clause included the following:

> Today, Oregon is the only state that requires the accused, on a plea of insanity, to establish that defense beyond a reasonable doubt. Some twenty states, however, place the burden on the accused to establish his insanity by a preponderance of the evidence or some similar measure of persuasion. While there is an evident distinction between these two rules as to the quantum of proof required, we see no practical difference of such magnitude as to be significant in determining the constitutional question we face here. Oregon merely requires a heavier burden of proof. In each instance, in order to establish insanity as a complete defense to the charges preferred, the accused must prove that insanity. The fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but it is

> plainly worth considering in determining whether the practice "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).
>
> Nor is this a case in which it is sought to enforce against the states a right which we have held to be secured to defendants in federal courts by the Bill of Rights. . . . "The judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment. . . . An important safeguard against such merely individual judgment is an alert deference to the judgment of the state court under review." MR. JUSTICE FRANKFURTER, concurring in *Malinski v. New York*, 324 U.S. 401, 417 (1945). We are therefore reluctant to interfere with Oregon's determination of its policy with respect to the burden of proof on the issue of sanity since we cannot say that policy violates generally accepted concepts of basic standards of justice.

343 U.S. at 798-99 (footnote omitted, emphasis added).

In *Powell v. Texas*, 392 U.S. 514 (1968), this Court discussed the criminal responsibility of persons alleging disease or diminished mental capacity. In refusing to state a constitutional rule regarding the consideration of such claims, the Court stated:

> We cannot cast aside the centuries-long evolution of the collection of

interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his antisocial deeds. The doctrines of actus reus, mens rea, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States.

Nothing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms. Yet, that task would seem to follow inexorably from an extension of *Robinson* to this case. If a person in the "condition" of being a chronic alcoholic cannot be criminally punished as a constitutional matter for being drunk in public, it would seem to follow that a person who contends that, in terms of one test, "his unlawful act was the product of mental disease or mental defect," *Durham v. United States*, 94 U.S. App. D.C. 228, 241, 214 F.2d 862, 875 (1954), would state an issue of constitutional dimension with regard to his criminal responsibility had he been tried under some different and perhaps lesser standard, *e.g.*, the right-wrong test of M'Naghten's Case. The experimentation of one jurisdiction in that field alone indicates the magnitude of the problem. . . . But formulating a constitutional rule would reduce, if not eliminate, that fruitful experimentation, and freeze the developing productive dialogue between law and

> psychiatry into a rigid constitutional mold. It is simply not yet the time to write into the Constitution formulas cast in terms whose meaning, let alone relevance, is not yet clear either to doctors or to lawyers.

392 U.S. at 535-37 (footnotes omitted, emphasis added).

The holdings of *Powell* and *Leland* were recently affirmed in *Medina v. California*, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992), wherein this Court reviewed California statutes requiring a defendant who alleges that he is incompetent to stand trial to bear the burden of proving so by a preponderance of the evidence. Initially, the Court restated the standard set out in *Leland* (and later *Patterson v. New York*, 432 U.S. 197 (1977)) for determining whether the Due Process Clause is violated, declaring it to be the proper analytical approach:

> "Among other things, it is normally 'within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion,' and its decision in this regard is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"

112 S. Ct. at 2577, *quoting Patterson v. New York*, 432 U.S. at 201-02 (citations omitted).

The Court went on to hold that the rule allocating to the defendant the burden of proving competence to stand trial does not offend due process. In reaching that conclusion, the Court made the following statement:

> [W]hile the Due Process Clause affords an incompetent defendant the right not to be tried, *Drope v. Missouri*, *supra*, 420 U.S. [162] at 172-173, 95 S. Ct. [896] at 904 [1975]; *Pate v. Robinson*, *supra*, 383 U.S. [384] at 386, 86 S. Ct. [836] at 842 [1966], we have not said that the Constitution requires the States to recognize the insanity defense. See, *e.g.*, *Powell v. Texas*, 392 U.S. 514, 536-37, 88 S. Ct. 2145, 2156-57, 20 L. Ed. 2d 1254 (1968).

Thus, this Court has clearly reiterated the standard for determining whether a criminal procedure violates due process and has specifically held that the Constitution does not require that a state recognize and use any specific insanity defense.[1] Given these rulings, Cowan cannot persuasively argue that the issue of whether Montana's statutes violate the Constitution is unsettled. Cowan's contention that the criminal law must recognize a person's diminished capacity by allowing a person to present an affirmative defense of insanity is exactly the premise that this Court rejected in *Powell* and *Leland*.

Cowan's assertion that the Eighth Amendment requires the availability of a specific insanity defense is also unsupported. Cowan's nonspecific argument on this point refers to a traditional concept of criminal culpability. But he does not articulate how his treatment pursuant to Montana statutes violates his right to be free from cruel and unusual punishment. The sentence imposed in this case recognizes Cowan's potential need for treatment outside the prison setting and allows alternative placement.

---

[1]*See also Foucha v. Louisiana*, 112 S. Ct. 1780, 1790 (O'Connor, concurring), 1794-95 (Kennedy, dissenting) (1992).

This Court's holdings regarding the Eighth Amendment do not support the Petitioner's assertion that mental capacity provides a basis for finding cruel and unusual punishment. *Penry v. Lynaugh*, 492 U.S. 302 (1989) (Eighth Amendment does not categorically prohibit execution of mentally-retarded capital murderer); *Stanford v. Kentucky*, 492 U.S. 361 (1989) (death sentence of petitioner who was approximately 17 years old at the time of the offense was not violative of the Eighth Amendment). The Court should not consider this meritless claim.

II. MONTANA'S STATUTE REGARDING AN INFERENCE IN DELIBERATE HOMICIDE CASES DID NOT RESULT IN THE APPLICATION OF A CONCLUSIVE PRESUMPTION.

Cowan argues that the following Montana statute constitutes a conclusive presumption of the type declared unconstitutional in *Sandstrom v. Montana*, 442 U.S. 510 (1979): "In a deliberate homicide, knowledge or purpose may be inferred from the fact that the accused committed a homicide and no circumstances of mitigation, excuse, or justification appear." Mont. Code Ann. § 45-5-112 (1989). He contends that the statute resulted in the application of an irrebuttable presumption which precluded consideration of his mental condition as it related to the mental state required for the charged offenses.

This statute was not discussed at trial. Because the trial was held before the court, rather than a jury, there is no indication in the record that the statute was specifically considered; there was no homicide committed. The Montana Supreme Court, relying on its relevant precedent, held that "Section 45-5-112, MCA, establishes a permissive inference, not a conclusive presumption." (Pet. App. 9a.)

Cowan cannot establish that application of the above statute resulted in a due process violation in this case. Contrary to the facts of *Sandstrom*, there is no basis in the facts of this case or the language of this statute, which supports a finding that the factfinder applied a conclusive presumption to relieve the state of its burden to prove beyond a reasonable doubt the mental elements of the crimes charged.

CONCLUSION

The Petitioner has failed to demonstrate adequate grounds for consideration by this Court of the questions presented and the petition should be denied.

Respectfully submitted,

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